IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-557

CONSOLIDATION COAL COMPANY, Petitioner

v.

UNITED STATES OF AMERICA, Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT AND APPENDICES

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To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioner, Consolidation Coal Company, respectfully prays that a writ of certiorari issue to review the opinion and order of the United States Court of Appeals for the Sixth Circuit filed in this proceeding on July 21, 1977, reversing orders of the United States District Court for the Southern District of Ohio suppressing evidence in this criminal prosecution and remanding the case.

OPINIONS BELOW

The opinion of the Sixth Circuit, not yet reported, is reprinted in the Appendix attached to this petition (A. 1a-18a). The unreported memoranda and orders of the District Court are also reprinted in the Appendix (A. 21a-41a, 42a-44a).

JURISDICTION

The opinion and order of the Sixth Circuit was filed on July 21, 1977. A timely petition for a rehearing *en banc* was denied by the Sixth Circuit on September 16, 1977 (A. 19a), and this petition for certiorari was filed within 30 days of that date. On September 26, 1977, the Sixth Circuit granted petitioner's motion to stay issuance of its mandate pending the filing of this petition (A. 20a).

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Petitioner is informed that at least Robert Lasick, Richard Schrickel and Francis Leo Marks, appellants in Nos. 76-2519, 76-2520 and 76-2521, respectively, in the Court of Appeals for the Sixth Circuit, are also filing petitions for a writ of certiorari.

QUESTIONS PRESENTED

1. Whether the less stringent showing of probable cause required to obtain search warrants to conduct routine administrative compliance inspections is sufficient under the Fourth Amendment to justify the issuance of warrants to conduct searches and seizures in

offices where the purpose of the searches and seizures is the discovery of evidence of suspected criminal violations of the Federal Coal Mine Health and Safety Act of 1969?

2. Whether a federal coal mine inspector's statutory right of entry into a "coal mine" for the purposes of making inspections and investigations gives rise to the right to obtain an administrative warrant to force entry into petitioner's private offices and to search for and seize records and other personal property contained therein?

3. Whether the affidavits used to obtain the search warrants at issue supply the requisite probable cause?

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT IV—SEARCHES AND SEIZURES

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The provisions of the Federal Coal Mine Health and Safety Act of 1969 relevant to the issues raised in this case are lengthy and have therefore been set forth in the Appendix attached to this petition (A. 96a-105a). The sections involved are:

Section 103 (30 U.S.C. § 813), entitled "Inspections and Investigations";

Section 108 (30 U.S.C. § 818), entitled "Injunctions"; and

Section 109 (30 U.S.C. § 819), entitled "Penalties".

STATEMENT OF THE CASE

On May 21, 1974, at the request of attorneys from the Government Regulations and Labor Section, Criminal Division, United States Department of Justice, a federal magistrate issued search warrants[1] relating to various offices in petitioner's Central Division in Eastern Ohio.

All of the warrants but one were based upon the affidavit of William E. Holgate (A. 53a-56a), an employee of the Mining Enforcement and Safety Administration of the Department of the Interior. The remaining warrant was supported by both Holgate's affidavit and that of Thomas A. Jeskey (A. 58a-60a), a federal coal mine inspector.

The Holgate and Jeskey affidavits referred to information obtained from an unnamed former employee of petitioner concerning alleged irregularities in the respirable dust sampling program at certain mines of petitioner. The affidavits recited that evidence of violations of criminal provisions of the Federal Coal Mine Health and Safety Act of 1969 was believed to be concealed in the offices to be searched (See, e.g., 52a-53a, 55a).

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1. The six search warrants involved in this case, with attached returns and affidavits, have been reprinted in the Appendix (A. 49a-95a). To avoid duplication, the typewritten portions of the Holgate affidavit filed in support of each warrant have been reproduced only with respect to the first warrant.

The warrants were executed in a surprise raid on May 22, 1974 by federal inspectors who had been appointed special deputy marshals. There was no prior demand upon petitioner for the desired materials.

In the searches and seizures conducted pursuant to the warrants, the deputy marshals confiscated from petitioner's private offices a great mass of books, note pads, folders and cassettes, as well as metal file card containers, entire file cabinets or drawers, and a set of scales (See, e.g., 51a, 87a, 93a).

In the Summer of 1975, indictments were returned against petitioner (and eight of its current or former employees) charging numerous separate violations of two criminal provisions of the Coal Mine Health and Safety Act,[2] as well as two counts of criminal conspiracy.[3] The indictments were based, entirely or primarily, upon the documents seized in the May 1974 raid and the fruits of such seizures.

Petitioner filed a timely motion for return of seized property and suppression of evidence in the District Court. In June of 1976 the District Court granted petitioner's motion on the ground that the affidavits used to obtain the warrants failed to show probable cause under the two-prong test established by this Honorable Court in *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969). (A. 21a-41a.) Respondent's subsequent motion for reconsideration was denied by memorandum and order filed by the District Court on September 2, 1976 (A. 42a-44a).

Respondent appealed under the provisions of 18 U.S.C. § 3731, certifying that the suppressed evidence

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2. Section 109(b) and (d), 30 U.S.C. § 819(b) and (d). (A. 104a, 105a.)

3. 18 U.S.C. § 371.

was "a substantial proof of the charge[s] pending against the defendant[s]." On July 21, 1977, the Sixth Circuit reversed and remanded, a plurality of the panel holding, *sua sponte,* that the administrative standard of probable cause announced in *Camara v. Municipal Court,* 387 U.S. 523 (1967) and *See v. City of Seattle,* 387 U.S. 541 (1967) applied in this case and that the affidavits satisfied this less stringent test.[4] Circuit Judge Engel, concurring in the result, concluded that the affidavits had met the more onerous standards of *Aguilar* and *Spinelli,* but found "certain issues relating to administrative searches and seizures covered [in the majority opinion] . . . sufficiently troublesome . . . that . . . their resolution [should be saved] until the case arises which demands it." (A. 18a.)

REASONS FOR GRANTING THE WRIT

1. The Decision of the Sixth Circuit Is in Direct Conflict With a Decision of the Supreme Court of Michigan.

This is a case of first impression under the investigation and inspection provisions of the Coal Mine Health and Safety Act.

A fundamental issue presented for review here is whether probable cause for the issuance of the search warrants should have been tested for constitutional sufficiency by the criminal standard established in *Aguilar* and *Spinelli* or by the less stringent administrative measure enunciated in *Camara* and *See.*

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4. The applicability in this case of an administrative standard of probable cause was neither briefed nor argued by any party in the District Court or the Sixth Circuit.

In *Camara* and *See,* this Court held that inspectors were permitted to conduct routine, visual inspections of premises (an apartment building and a warehouse) to determine compliance with housing code (*Camara*) and fire code (*See*) regulations after obtainment of a warrant upon a showing of probable cause less stringent than that required in criminal cases. In so holding, this Court observed that the *routine* regulatory inspections in those cases were "neither personal in nature nor aimed at the discovery of evidence of a crime, . . ." and thus involved "a relatively limited invasion of the urban citizen's privacy." *Camara, supra* at 537.

The Sixth Circuit[5] acknowledged the obvious fact that the searches and seizures involved here were "predicated upon overt criminal suspicion rather than administrative necessity."[6] (A. 7a.) Moreover, the affidavits and warrants expressly demonstrate that the searches and seizures were to obtain evidence of suspected criminal violations of the Act (See, e.g., 45a-46a, 52a-53a, 55a).

Despite the undoubted criminal nature and form of the searches and seizures, the Sixth Circuit found that the searches were " 'routine' in scope if not in motivation" and that "[t]heir regulatory character was not diminished" by the manifest criminal suspicion which prompted them (A. 7a). In the context of the Coal Mine

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5. Hereinafter, reference to the "Sixth Circuit" shall refer to the majority opinion of Circuit Judges Celebrezze and Cecil in this case.

6. The Sixth Circuit further noted that the "criminal orientation" of the investigation was "dramatized by the fact that the mine safety inspectors who executed the warrants were deputized as Special Deputy United States Marshals." (A. 4a.)

Health and Safety Act, the Court further held that "[t]he basic rationale for demanding a more compelling showing of probable cause where the purpose of the intrusion is to uncover the fruits or instrumentalities of crime is inapposite. . . ." (A. 13a.) Moreover, the Court found it impractical to require a magistrate to distinguish, *ab initio,* between criminal searches and those prompted merely by administrative necessity. It therefore reached the following conclusion:

> "The magistrate's task will be expedited and the opportunity for reversible error substantially reduced if all Section 813 search warrant applications are subject to a uniform, administrative standard of review, *whether or not criminal violations of the Act are suspected.*" (Emphasis added.) (A. 15a.)

By so holding, the Sixth Circuit is in direct conflict with the Supreme Court of Michigan, which found that the distinction between routine administrative searches and criminal investigations articulated by this Court in *Camara* and *See* must be respected and retained.

In *People v. Tyler,* 399 Mich. 564, 250 N.W. 2d 467 (1977),[7] which involved an administrative fire investigation statute, the Michigan Supreme Court held that post fire searches made under that statute for the purpose of determining the cause and source of the fire may properly occur with a warrant obtained under *Camara's* reduced standard of probable cause. While recognizing that the distinction between an administrative inspection and a criminal investigation may pose difficulties (Id. at 474), the Michigan Court, relying upon this Court's decision in *Camara,* held that "where the investigation

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7. Petition for certiorari granted on October 3, 1977 at No. 76-1608 in this Court.

turns to the collection of criminal evidence, . . ." (Id. at 475) and "the authorities are seeking evidence to be used in a criminal prosecution, the usual [criminal] standard (probable cause to believe that evidence of a crime will be found) will apply." Id. at 477. "The differing probable cause requirements reflect the greater need to protect against the more extensive and more intrusive criminal investigative search." Id. at 473.[8]

This conflict reflects an important and fundamental constitutional issue which should be resolved by this Court. The issue is this: *Does the right to obtain an administrative warrant announced in Camara and See depend upon the administrative character of the statute involved — irrespective of the nature of the search — as the Sixth Circuit would have it, or, in the view of the Supreme Court of Michigan, upon the nature of the search to be conducted.*

If certiorari is granted, petitioner will argue that the nature and purpose of the search, raising as it does the extent of the intrusion upon constitutionally protected privacy rights, governs the selection of the standard to measure probable cause for the issuance of the warrant, even though the imposition of such a standard may impose practical problems upon the issuing magistrate in some cases.

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8. *United States v. Goldfine,* 538 F.2d 815 (9th Cir. 1976) may also be contra the *Tyler* decision as the defendants there were under criminal suspicion at the time the administrative warrant was issued to search their records. However, in *Goldfine,* the affidavit used to obtain the warrant made no mention of any suspected criminal activity and the warrant appears to have been limited to records (or lack of records) required to be maintained by the act involved. Moreover, in *Goldfine,* the administrative warrant was specifically authorized by a statu-

As in other criminal statutes, the penalty provisions of the Coal Mine Health and Safety Act impose substantial fines and imprisonment.[9] Moreover, despite the fact that the criminal violations arise under an administrative statute, the intrusion on privacy and dignity resulting from the searches and seizures designed to obtain proof of such crimes is the same as in other crimes,[10] as evidenced by the surprise raid conducted here by the deputy United States marshals and the "wholesale" and forcible seizure of property.

It is submitted that the right to an administrative search warrant sanctioned by this Court in *Camara* and *See*[11] lies not in the administrative character of the statute involved but rather in the relative intrusiveness of the search to be conducted.[12] Where, as here, the type of privacy invasion involved is as serious an intrusion as in any other criminal investigation, it should be accorded the same Fourth Amendment protection.

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tory provision in the Act; here, no statutory authorization is provided in the Coal Mine Health and Safety Act for administrative warrants. Another case that may be contrary to *Tyler* is *United States v. Blanchard,* 495 F.2d 1329, 1330-31 (1st Cir. 1974).

9. Up to $50,000 and five years for a second offense.

10. *LaFave, Administrative Searches and the Fourth Amendment: The Camara and See cases,* 1967 Sup. Ct. Rev. 1, 18-20, cited by the Court in *Tyler, supra* at 473 n. 15.

11. Chief Justice Burger, speaking for the Majority of this Court in *South Dakota v. Opperman,* 428 U.S. 364, 371 n. 5 (1976), clearly recognized the distinction between criminal investigations and "routine, noncriminal procedures" in considering the Fourth Amendment reasonableness requirement.

12. *LaFave, supra.*

2. The Sixth Circuit Has Improperly Construed the Act as Sanctioning a Search and Seizure in Petitioner's Private Office With an Administrative Warrant and, In So doing, Is in Conflict With the Ninth Circuit.

Having held that the nature of the search (i.e., an intrusion to obtain evidence of a crime) was irrelevant in determining the appropriateness of an administrative warrant under the Coal Mine Health and Safety Act, the Court then decided that the Act authorized the use of administrative warrants in this case. As the following discussion will show, this decision conflicts with a decision of the Ninth Circuit as to the type of administrative statute which will authorize the issuance of administrative warrants.

The Sixth Circuit held that an administrative warrant could issue here because "the proposed searches were sanctioned by the [Coal Mine Health and Safety] Act, . . ." (A. 12a.) In reaching this result, the Court reasoned that 30 U.S.C. § 813(a) and (b), which gives inspectors "a right of entry to, upon or through any *coal mine*" (emphasis added) for the purpose of making inspections and investigations

> "bespeaks a congressional intent to permit federal inspectors *to enter coal mine offices in the normal course* and to *independently* access and review *(if not seize)* pertinent indicia of compliance with the Act." (A. 8a.) (Emphasis partially added.)

Having concluded that it could find from the Act (1) a right of entry into petitioner's private offices "[e]ven in

the absence of warrants" (A. 9a),[13] the Court *implied* (2) a right to "access and review" documents contained therein (A. 8a).

The Court then addressed itself to the massive *seizure* of documents which occurred here. Though acknowledging that "nothing in the Act authorizes the wholesale seizure of records which took place here" (A. 6a), it nevertheless further *implied* a right of seizure in the Act. In that regard, the Court reasoned as follows:

> "Although the Act does not expressly empower investigators to use self-help to locate objects of their inquiry which may be intermingled in mine operators' files, neither does it establish formal demand as a condition precedent to accessing them." (A. 10a.)

Apparently concluding, without citing any empirical evidence whatsoever, that the Congressionally man-

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13. If granted review, petitioner will challenge the Sixth Circuit's interpretation of the definition of the phrase "coal mine" (30 U.S.C. § 802(h)) as including an operator's private offices. *If petitioner is correct, this would mean that the right of entry into private mine offices must be implied from the Act as well.* The decision of the three judge panel in *Youghiogheny and Ohio Coal Company v. Morton,* 364 F. Supp. 45, 51 n. 5 (S.D. Ohio 1973), to the effect that "[t]he mine operator . . . does have a general expectation of privacy in his offices on the mining property", despite the right of warrantless entry otherwise granted with respect to underground portions or active workings of coal mines, is consistent with petitioner's position and clearly contrary to the Sixth Circuit's definition of "coal mine" as including the operator's offices. In point of fact, it is inexplicable that the Sixth Circuit could reach the conclusion it did inasmuch as it began its opinion in this case in apparent agreement with the holdings foregoing in *Youghiogheny.*

14. 30 U.S.C. § 813(d) (A. 97a-98a).

dated subpoena[14] and injunctive[15] powers for obtaining desired documents lacked the necessary surprise for effective compliance enforcement inherent in an unannounced raid, the Court held that Section 813(a) and (b), given a liberal and expansive interpretation, must be read to authorize by implication the obtainment of administrative warrants to effect not only entry into private offices but retrieval of materials found there (A. 11a).

Petitioner respectfully submits that the Sixth Circuit's expansive interpretation of the investigatory powers authorized by the Coal Mine Health and Safety Act is not only erroneous but in conflict with the Ninth Circuit in the case of *Midwest Growers Co-Op. Corp. v. Kirkemo,* 533 F.2d 455 (9th Cir. 1976), which involved administrative inspections under the Interstate Commerce Act.

In *Kirkemo,* relevant portions of the Act authorized the Commission or its agents to "have *access* to and . . . to *inspect, examine,* and *copy* any and all accounts, books, records, [and] memorandums, . . ." (49 U.S.C. § 320(g)) (emphasis added) of the involved corporation during normal business hours. Despite this broad statutory grant of administrative authority, the Ninth Circuit refused to imply from the statute the authority to use an administrative warrant to enforce the inspection procedure because the Act did not expressly provide for a right of entry upon the premises where the documents and other materials were located.

In this regard, the Ninth Circuit held that "[i]n the absence of statutory authority to enter, the agency

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15. 30 U.S.C. §818 (A. 100a-101a).

must utilize other investigatory techniques" provided by the statute. Id. at 462-63. The investigatory techniques referred to by the Court were the right to obtain injunctive relief to compel the disclosure of records and the authority to bring criminal action against those who refused to provide access to records subject to inspection.

Although cognizant of this Court's prior decisions in *Camara, See* and *Colonnade Catering Corp. v. United States,*[16] the Ninth Circuit found nothing in those cases "to indicate that the [Supreme] Court was fashioning a general rule to allow all administrative agencies to utilize search warrants for their investigations." Id. at 462. Moreover, in the absence of "express authority in the Interstate Commerce Act . . . for the Commission to use an 'administrative inspection search warrant' to enforce its statutory right of inspection, . . .", the Court would not imply a right of entry sufficient to support the use of an administrative warrant since the latter represented a "radical departure from the injunctive procedure established by Congress . . ." Id. at 462.

Petitioner interprets *Kirkemo* as holding in principle that an administrative search warrant cannot be obtained unless there is an express statutory grant of authority to do that which is sought to be accomplished with the warrant. In *Kirkemo,* the right of access to the documents, as well as the right to examine and copy such documents, was statutorily provided. However, the Ninth Circuit would not imply a right of entry[17] suffi-

16. 397 U.S. 72 (1969).

17. The Ninth Circuit never expressly considered the issue as to whether a right of seizure would have existed had the statutory right of entry been provided, probably because the Commission's agents only copied documents and never actually seized them, as here.

cient to justify the issuance of an administrative warrant.

By contrast, the Sixth Circuit has in this case *implied* from the Coal Mine Health and Safety Act (1) a right of entry into petitioner's private offices,[18] (2) a right to access and review documents in those offices (3) and, most significantly, a right of seizure of the documents. On the basis of these implications, it further implied the authority to use an administrative warrant to effectuate these ends. Clearly, none of these investigatory powers is expressly provided for in Section 813(a) and (b), or any other section of the Coal Mine Health and Safety Act. However, unlike the Ninth Circuit, the Sixth Circuit interpreted statutory omissions with respect to the permissible objects of inspection "as evidence of congressional intent to endow mine safety inspectors with the broadest possible discretion." (A. 9a.)

Among the questions raised by this conflict to which this Court has not yet addressed itself, and as to which guidelines are needed, the following are believed to be important:

1. May the right to use an *ex parte* administrative warrant to compel entry and seize documents be *implied*

18. This analysis assumes that the *Youghiogheny* Court's finding that the inspector's right of entry did not include the private offices is correct and that the Sixth Circuit's expansive interpretation of the definition of "coal mine" is incorrect. Thus, even if *Kirkemo* stands only for the proposition that the Act must expressly grant a "right of entry" to enable the investigator to obtain a *Camara-See* warrant, the Ninth Circuit is still in conflict with the Sixth Circuit since the latter Court justified the use of an administrative warrant in the operator's private offices where there is no express right of entry provided in the Act.

from a statute which does not expressly grant the administrative agency the right to enter the premises, the right to access and review documents on the premises and the right to seize such documents, especially where the statute expressly provides other procedures to compel entry and force production and delivery of desired records and other materials?

2. To what extent is the solution to question No. 1 dependent upon or affected by:

(a) The type and relative effectiveness of the other procedures provided for by Congress in the statute, and

(b) The fact that Congress has in several regulatory statutes enacted since *Camara* and *See* expressly authorized the issuance of administrative search warrants as a method of enforcing investigatory powers and has furnished the guidelines for determining when they should be issued?

In the Coal Mine Health and Safety Act, enacted two and one-half years after *Camara* and *See,* Congress clearly and carefully provided that entry as well as documents and records could be obtained from uncooperative mine operators by subpoena[19] and injunctive relief[20]

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19. 30 U.S.C. § 813(d), which authorizes the Secretary of the Interior to issue subpoenas for "the production of relevant papers, books, and documents, . . ." in connection with the "investigation of any accident or *other occurrence* relating to health or safety in a coal mine, . . .". (A. 97a.) (Emphasis added.)

20. 30 U.S.C. § 818, which authorizes the Secretary of the Interior to obtain an injunction to compel an operator to, *inter alia,* "admit [the inspector] to the mine" or "permit the inspection of the mine" or "furnish any information or report requested . . ." or "permit access

and also subjected such operators to penalties. [21] However, unlike the Comprehensive Drug Abuse Prevention and Control Act[22] and other post *Camara-See* legislation,[23] it did not expressly provide for the issuance of administrative search warrants as a means of enforcing the agency's investigatory powers. In such circumstances, it is extremely difficult to imply a Congressional intent to authorize the use of administrative warrants.

Moreover, the Ninth Circuit's opinion in *Kirkemo* reflects the potentially serious consequences of implying such warrants. The *ex parte* administrative search warrant sanctioned in this case, although no doubt less burdensome to the investigator, *is,* as Judge Jameson indicated, a "radical departure" from the subpoena and injunctive procedures established by Congress in the Coal Mine Health and Safety Act, particularly when the administrative warrant is used, as here, to obtain proof of a suspected crime. As discussed earlier, the consequences to the coal operator from the use of *ex parte* warrants

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to, and copying of, such records as the Secretary . . . determines necessary in carrying out the provisions of . . . [the Act]." (A. 100a.)

21. 30 U.S.C. § 819(a)(1).

22. 21 U.S.C. § 880, which was enacted less than a year after the Coal Mine Health and Safety Act. It is interesting to observe that the legislative history of the Drug Abuse Prevention and Control Act shows that administrative search warrants were expressly provided for in response to this Court's decisions in *Camara* and *See*. H.R. REP. No. 91-1444, 91st Cong., reprinted in 2d Sess., [1970], U.S. CODE CONG. & AD. NEWS, p. 4623.

23. See, for example, the Federal Environmental Pesticide Control Act of 1972, 7 U.S.C. §§ 135 et seq., 136g(b); the Endangered Species Act of 1973, 16 U.S.C. §§ 1531 et seq., 1540(e)(2) and (3); and the Federal Noxious Weed Act of 1974, 7 U.S.C. §§ 2801 et seq., 2806.

can be severe, as evidenced by the police-like intrusion which took place here.

It would appear that Congress, by its failure to authorize expressly the use of administrative warrants in the Coal Mine Health and Safety Act, while expressly providing for subpoenas, injunctions and fines, intended a prior demand for and refusal of entry or documents followed by an adversary enforcement proceeding. The radical *ex parte* procedure was sanctioned by the Sixth Circuit on the bald assumption, for which there is no known evidence, that the Congressionally mandated procedure will be insufficient to enforce compliance in any case, civil or criminal. It is submitted that it is far more appropriate to use the statutorily mandated enforcement methods except where there is a reasonable suspicion of such things as a criminal violation of the Act or obstruction of justice. In these circumstances, an appropriate *criminal* search warrant should be obtained. This is precisely the approach which the Department of Justice attorneys themselves apparently believed they were required to use in this case.

Stanford Daily v. Zurcher, 353 F. Supp. 124 (N.D. Calif. 1972); aff'd, 550 F. 2d 464 (9th Cir. 1977); cert. granted October 3, 1977 at No. 76-1484, raises analogous policy issues, in the third-party search context, as to the use of available means less drastic and intrusive than a search warrant for obtaining materials when the available procedures are fully adequate.

Additionally, as the *Kirkemo* court found, there is nothing in this Court's prior decisions indicating an intention to establish a general rule allowing all administrative agencies to employ administrative warrants in their investigations. There is confusion as to the extent

to which the right to such warrants may be implied from administrative statutes which do not expressly provide for them.

3. The Affidavits Used to Obtain the Search Warrants at Issue Failed to Supply the Requisite Probable Cause for the Issuance of the Warrants.

If granted review, and this Court determines that an administrative standard of probable cause is inappropriate, petitioner contends that the Holgate and Jeskey affidavits (A. 53a-56a, 58a-60a), which were based in substantial part upon information obtained from an unnamed informant, failed to satisfy the two-prong test of probable cause established by this Court in *Aguilar and Spinelli, supra.* More specifically, petitioner contends that the affidavits failed to show that the informant was himself trustworthy or that his information was reliably obtained.

As the District Court properly observed:

> "The crucial part of the [Holgate and Jeskey] affidavits is the relating of the activities of Kull and McNickles at the Georgetown laboratory and, as discussed above, there is simply no indication as to how this information was obtained. Informant did not state he personally observed these activities, and there is no indication that Kull and McNickles personally told the informant about their activities; even assuming that they did, a myriad of different problems would arise regarding the reliability of these individuals." (A. 41a.)

Other than the activities of Messrs. Kull and McNickles, the other information supplied by the affidavits was, as

the District Court also observed, "neutral, having no probative effect on whether any alleged illegality was in fact occurring." (A. 40a.)

Alternatively, if this Court were to determine that an administrative standard of probable cause is applicable, petitioner contends that the affidavits used herein fail to satisfy even the lesser showing of probable cause required for such administrative warrants and that the Sixth Circuit's analysis of the affidavits and the surrounding circumstances was erroneous.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

Nos. 76-2518, 76-2519, 76-2520, 76-2521, 76-2522

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
CONSOLIDATION COAL COMPANY, a corporation; ROBERT LASICK, RICHARD SCHRICKEL, FRANCIS LEO MARKS, RAYMOND ZITKO, individuals,
Defendants-Appellees.

APPEALS from Memoranda and Orders of the United States District Court for the Southern District of Ohio.

Decided and Filed July 21, 1977.

Before: CELEBREZZE and ENGEL, Circuit Judges, and CECIL, Senior Circuit Judge.

CELEBREZZE, Circuit Judge, delivered the opinion of the Court, in which CECIL, Senior Circuit Judge, joined. ENGEL, Circuit Judge, (p. 15) filed a separate concurring opinion.

CELEBREZZE, Circuit Judge. These appeals arise in the context of a federal prosecution brought against Consolidation Coal Company and eight of its employees for criminal violations of the Federal Coal Mine Health and Safety Act of 1969, 30 U.S.C. § 801 *et seq*. The Government invokes 18 U.S.C. § 3731 to challenge two interlocutory orders of the district court granting evidentiary suppression and return to defendant Appellees of all materials seized in May, 1974, during simultaneous

searches of five Company coal mine offices and its general office in Ohio. These searches were authorized by six warrants issued by a federal magistrate.[1] In finding the requisite probable cause, the magistrate relied upon two affidavits sworn to by agents of the United States Department of the Interior. The affidavits recited an account by an unnamed, ex-employee of systematic efforts by the Company to evade the respirable dust concentration standards and monitoring requirements imposed by Section 842 of the Act.[2]

The confidential informant claimed that the Company caused all ambient atmospheric dust samples taken pursuant to Section 842(a) to be weighed in its own laboratory prior to submitting them to the Secretary of the Interior for analysis. If a legitimate sample were found to offend the mandatory federal standard, an artificially "clean" [low] sample, prepared by Company technicians under controlled conditions, would be substituted and the authenticating documentation altered to conform.[3] Such false reporting, if knowingly partici-

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1. Nine warrants were, in fact, issued and nine searches performed. No evidentiary materials were seized at one location and the Government voluntarily returned to the Company the fruits of two other searches.

2. Section 842 represents Congress' effort to remove one of the most serious hazards of coal mining. Prolonged inhalation of excessive concentrations of respirable coal dust is known to cause pneumoconiosis, a chronic lung disease commonly known as "black lung." In its advanced form pneumoconiosis leads to severe disability and premature death.

3. Sampling pursuant to Section 842 demands that certain miners wear a small, plastic air filtering device called a "cassette" and an air pump while working a normal production shift in the mines. The pump sucks air into the cassette, and filter paper inside captures the respirable dust particles. The resulting sample approximates the concentration of dust present in the mine atmosphere to which the miner bearing the cassette is exposed. When the miners completes his shift he turns the equipment over to a mine official and signs or initials a "mine data card" which identifies the miner, the date, the section of the mine in which the sample was taken, and the miner's occupation code. The mine official also signs the card. Each cassette is uniquely associated with its respective mine data card by a number which has been stamped on both by the manufacturer. To alter legitimate samples it is necessary to either physically open a cassette and remove a portion of the dust or to "void" the cassette and substitute a bogus one. The latter procedure would entail forging the miner's signature on the mine data card. The informant implicated the Company in both forms of deception.

pated in by all Appellees, would violate three criminal provisions of the Act, 30 U.S.C. § 819(b), (c) and (d).[4]

In September, 1975, the Appellees and others were named in a 178 (*sic*) count federal indictment charging them with numerous violations of 30 U.S.C. § 819 as well as two counts of conspiracy. In October, the Company moved to suppress the evidentiary fruits of the searches

4. Section 819(b) subjects an operator who "willfully violates a mandatory health or safety standard * * *" to a maximum penalty of $25,000. fine or one year in jail or both. Section 819(c) extends this liability to any director, officer or agent of such corporation "who knowingly authorized, ordered, or carried out such violation." Section 819(d) imposes a maximum penalty of $10,000. fine and/or six months in jail for making "any false statement, representation, or certification in any application, record, report, plan or other document" filed or maintained pursuant to the Act.

of its six offices.[5] The district court responded to the criminal nature of the proceeding, the key role played by the confidential informant, and the criminal focus of the original investigation[6] by treating this motion as an invitation to assess the constitutional sufficiency of the Government's warrant affidavits under the stringent, two-pronged test of the reliability of a criminal "tip" articulated in *Aguilar* v. *Texas,* 378 U.S. 108 (1964), and *Spinelli* v. *United States,* 393 U.S. 410 (1969). The court concluded that the two affidavits, even when read in concert, imparted information which was conclusory, potentially stale, and otherwise insufficient to establish probable cause to believe that Appellees had committed or were in the process of committing criminal acts. Therefore, in June, 1976, the district court granted the Company's motion to suppress.

Subsequently, seven of the individual defendants, including the individual Appellees herein, filed motions to suppress the evidence seized from their respective Company offices. Only Appellees Marks and Zitko asserted 4th amendment standing as persons aggrieved by all six intrusions and moved for suppression of all of the seized evidence despite the fact that only a portion of the materials were uncovered in their private

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5. A substantial volume of records and documents were seized [including a number of metal file cabinets and file card drawers containing allegedly relevant data] as well as a number of sampling cassettes.

6. This criminal orientation was dramatized by the fact that the mine safety inspectors who executed the warrants were deputized as Special Deputy United States Marshals.

offices.[7] In October, 1976, the district court granted the suppression motions of all the individual Appellees. At this point the court had already denied a Government motion for reconsideration of its adverse June ruling. The Government seasonably perfected the instant appeals which were consolidated on motion for oral argument and disposition.

The Government advances three alternative rationales for reversing the district court's orders: 1) the searches were constitutionally permissible without warrants under Section 813(a)(4) which authorizes "frequent inspections and investigations in coal mines * * * for the purpose of * * * determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under [the Act]," *see Yougiogheny* (sic) *and Ohio Coal Company* v. *Morton,* 354 [364] F. Supp. 45 (S.D. Ohio 1973); 2) the district court improperly undertook a *de novo* review of the quantum of probable cause supplied by the Government's affidavits without due deference to the judgment of the magistrate, *United States* v. *Giacalone,* 541 F.2d 508, 513 (6th Cir. 1976); 3) even if the affidavits are found to be constitutionally infirm, the exclusionary rule should not apply here because the Government inspectors acted in good faith on the authority of facially valid warrants.

We reject out of hand the Government's first contention. The *Yougiogheny* (sic) decision stands for the proposition that only inspections of the *underground* portions or "active workings" of coal mines may be performed without search warrants under Section 813(a)

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7. The issue as to the standing of Marks and Zitko to challenge the searches is mooted by our disposition of their appeals on other grounds.

and (b). It expressly excludes from the purview of its holding warrantless searches of offices on the mining property in which "[t]he mine operator * * * does have a general expectation of privacy." 354 F. Supp. at 51 n. 5. In addition, nothing in the Act authorizes the wholesale seizure of records which took place here. Even where a statute requires records to be maintained and authorizes on-premises inspection of them in the normal course, no precedent sanctions direct access to the records without demand in the absence of a search warrant:

> It is implicit * * * that the right to inspect does not carry with it the right, without warrant in the absence of arrest, to reach that which is to be inspected by a resort to self-help in the face of the owner's protest.
>
> *Hughes* v. *Johnson,* 305 F.2d 67, 69 (9th Cir. 1962).

The Government wisely recognized its constitutional obligation to obtain prior judicial approval before entering the six mine offices to locate and seize allegedly incriminating records subsumed within Company files.

We agree with the Government's second contention that the scope of the district court's review of the two supporting affidavits was overly broad. However, rather than attribute this to the court's failure to honor the magistrate's original finding of probable cause, we see it as reflecting reliance upon an excessively demanding standard of review which ignored the administrative concerns which prompted the original warrant requests. This finding leads us to reverse the two suppression orders and to remand for further proceedings. We therefore need not reach the Government's third contention regarding the scope of the exclusionary rule.

The Government asserts that its affidavits will withstand an *Aguilar-Spinelli* analysis if read in a common sense rather than hypertechnical fashion. *United States* v. *Ventresca,* 380 U.S. 102 (1965), *United States* v. *Hodge,* 539 F.2d 898, 903 (6th Cir. 1976). Although we tend to agree, we are pursuaded that there are more compelling grounds for reversal than a mere misreading of the affidavits. In the absence of guidance from the case law, the district court treated the contested search warrants as implements of a conventional criminal investigation. In its memorandum opinion and order of September 2, 1976, denying the Government's motion for reconsideration, the court rejected the suggestion that the searches involved intrusions which fall within the scope of "inspections and investigations" authorized by Section 813(a). We believe that this conclusion was erroneous as a matter of law. It justified the overly strict scrutiny of the search warrant affidavits which pursuaded the court to grant Appellees' motions to suppress.

From our reading of the record and the enforcement provisions of the Act, we conclude that the searches in issue were essential components of a single compliance inquiry authorized by Section 813(a). They involved reasonable intrusions which were "routine"[8] in scope if not in motivation. Their regulatory character was not diminished by the fact that they were predicated upon overt criminal suspicion rather than administrative necessity. We hold that the district court erred in refusing to sustain these searches upon a lesser showing of probable cause comparable to that required

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8. Routine in the sense that they were permissible under the Act rather than that they were historically a common enforcement practice.

to obtain a warrant to perform a periodic, administrative inspection of a commercial establishment. *See* v. *City of Seattle,* 387 U.S. 541, 545 (1967).

We begin with the premise that the nature of the Act entitles it to expansive interpretation:

> Since the Act in question is a remedial and safety statute, with its primary concern being the preservation of human life, it is the type of enactment as to which a 'narrow or limited construction is to be eschewed.' (citation omitted) *Freeman Coal Mining Co.* v. *Interior Board of Mine Operations Appeals,* 504 F.2d 741, 744 (7th Cir. 1974); *accord, Zeigler Coal Co.* v. *Kleppe,* 536 F.2d 398, 405 (D.C. Cir. 1976).

Viewed in this light, Section 813 bespeaks a congressional intent to permit federal inspectors to enter coal mine offices *in the normal course* and to *independently* access and review (if not seize) pertinent indicia of compliance with the Act. Section 813(a) specifically empowers authorized representatives of the Secretary to carry out both "inspections and investigations in coal mines." Congress' inclusion of the term "investigation" reflects an intent to condone more intrusive, systematic invasion of commercial privacy than that associated with a mere inspection. It implicitly sanctions purposeful efforts to corroborate or disprove specific allegations of infraction.

Significantly, Section 813(a) does not restrict the purpose of investigations to ascertaining the causes of mine accidents. They may aid in "determining whether or not there is compliance with the mandatory health or safety standards" promulgated under the Act. 30 U.S.C. § 813(a). In marked contrast to the comparable provision of the Occupational Safety and Health Act

of 1970, 29 U.S.C. § 657(a)(2), Section 813(a) does not catalogue the permissible objects of inspection. We interpret this omission as evidence of congressional intent to endow mine safety inspectors with the broadest possible discretion.

It follows that business records and other paraphernalia, which are maintained pursuant to the Act, are appropriate targets for periodic federal scrutiny. *Youghiogheny and Ohio Coal Company* v. *Morton, supra* at 51 n. 5. In the instant case, these materials constitute the veritable life blood of a statutory scheme which contemplates responsible, self-monitoring of working conditions by mine operators. The efficacy of the respirable dust control program, 30 U.S.C. § 842, is entirely dependent upon the integrity with which operators sample, record and report these conditions. We see no other realistic way to ensure compliance short of direct, on-site access to these records as they are *internally* maintained.

Even in the absence of warrants, the investigators had the right to enter the six company facilities which were searched. Section 813(b)(1) provides a "right of entry to, upon, or through any coal mine" for the purpose of making any inspection or investigation mandated by the Act. The term "coal mine" is broadly defined in Section 802(h) to include "*all* structures * * * placed upon * * * or above the surface [of land] used in, or to be used in, or resulting from the work of extracting * * * coal."[9] All six offices, including the Com-

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9. Where Congress wished to limit the environmental scope of inspection, it did so in express terms. Thus the "spot inspections" authorized by Section 842(g) may only be performed in the "active workings" of mines, a term which we interpret to exclude mine offices.

pany's general office, were situated in close proximity to working mines and were instrumental in the administration of ongoing mine operations. They were, therefore, part of coal mine premises within the meaning of the Act and subject to entry by representatives of the Secretary at reasonable times.

Although the Act does not expressly empower investigators to use self-help to locate objects of their inquiry which may be intermingled in mine operators' files, neither does it establish formal demand as a condition precedent to accessing them.[10] Voluntary delivery upon request may be the procedure of choice; it may, in fact, be constitutionally imperative in the absence of a search warrant. *See Youghiogheny and Ohio Coal Company* v. *Morton, supra* at 51 n. 5. However, Section 813(a) confirms that Congress wished to foreclose any opportunity, potentially available to mine operators, to bias the inspection process:

> In carrying out the requirements of clauses * * * (4) [inspections and investigations for purposes of compliance review] * * *, no advance notice of inspection shall be provided to any person.

Only by fully exploiting the element of surprise can potentially unscrupulous mine operators be deterred from engaging in systematic evasion of the Act:

> Here, if inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential.
>
> *United States* v. *Biswell,* 406 U.S. 311, 316 (1972)

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10. The Secretary's subpoena power under 30 U.S.C. §813(d) is limited to compelling the production of records and witnesses at public hearings.

This secrecy requirement would be reduced to a hollow formalism if we were to read into the Act the obligation to make an access demand incident to every "surprise" inspection or investigation. Once an investigator has requested that sensitive data be voluntarily disclosed, the mine operator is immediately forewarned in spite of the confidentiality of the inspection schedule. This affords him an inherent opportunity to withhold unfavorable information or to supply bogus documents. In contrast, a surprise inspection of the physical conditions in the working mine provides a more reliable measure of compliance because overt violations of health and safety standards cannot be readily concealed in a matter of minutes. It therefore represents a more effective deterrent to sharp practices.

We conclude that Section 813(a) and (b) must be read to authorize federal investigators, as part of periodic investigations in coal mines, to enter mine offices in which they reasonably believe that evidentiary indicia of compliance are maintained and to retrieve these materials by searching areas in which it is likely that they will be found. Intrusions of this scope may only be undertaken pursuant to valid search warrants. The remaining question is what measure of probable cause should be applied by a judicial officer in deciding whether to issue such warrants.

At the outset we stated our belief that the six searches fell within the ambit of routine investigations sanctioned by Section 813. Nothing within the record militates to the contrary. The premises searched were permissible investigative targets because there was ample reason to surmise that they would be repositories of evidence of compliance (or non-compliance) with the

requirements of Section 842. The searches were accomplished during normal working hours so that forced entry or destruction of property was avoided. The scope of the intrusions *within* the offices was apparently limited to locales where pertinent records and dust sampling cassettes might be stored. No factor cited by the Appellees convinces us that the searches were an administrative ruse to justify unbridled, exploratory forays for evidence of *any* criminal infraction. The warrants themselves strictly limited the items which could be seized to those related to activities which would not have been engaged in by the Company but for the demands of Section 842.

In recognition that the proposed searches were sanctioned by the Act, the warrant applications should have been tested for constitutional sufficiency against an administrative standard of probable cause. *Camara* v. *Municipal Court of the City and County of San Francisco,* 387 U.S. 523 (1967), *Brennan* v. *Gibson Products, Inc. of Plano,* 407 F. Supp. 154 (E.D. Texas 1976). This is a "flexible standard of reasonableness that takes into account the public need for effective enforcement of the particular regulation involved." *See* v. *City of Seattle,* 387 U.S. at 545. Here the public need, recognized as "urgent" by Congress in the preamble to the Act, is the promotion of the "health and safety of [the coal mine industry's] most precious resources—the miner," 30 U.S.C. § 801(a). The demands of effective enforcement, which may prevent needless injury, disability or death, outweigh the "historic interests of 'self protection'" which would otherwise come into play when the inspector asks "that a property owner open his doors to search for 'evidence of criminal action' which may be used to

secure the owner's criminal conviction." *Camara* v. *Municipal Court of the City and County of San Francisco, supra* at 530.

The basic rationale for demanding a more compelling showing of probable cause where the purpose of the intrusion is to uncover the fruits or instrumentalities of crime is inapposite in this context. *See Camara* v. *Municipal Court of the City and County of San Francisco, supra* at 535. The scope of the searches became no broader because they were predicated on criminal suspicions than they would have been if justified by administrative exigencies. The magistrate would have been correct in issuing the warrants even if the investigators had only alleged a pattern of disparity between ambient dust levels reported by the Company and those visually observed during routine inspections. To deny warrant applications solely because criminal probable cause is lacking would frustrate compliance review and defeat attainment of the policy objectives of the Act. Where a search is routinely permissible on an administrative basis, it would indeed be anomolous if we were to raise the threshold probable cause requirement when the Government presents concrete evidence of irregular conduct by the mine operator. "If a valid interest justifies the intrusion contemplated, then there is probable cause to issue a suitably restricted search warrant." *Id.* at 539.

Our conclusion is bolstered by the fact that the coal mining industry has a history of close federal regulation under the aegis of the Commerce Clause. *See Yughiogheny and Ohio Coal Company* v. *Morton,* 364 F. Supp. at 49 & n. 3. Therefore, it is reasonable to assume that mine operators have a reduced expectation of privacy in their business offices than less highly scrutinized enter-

prises. *See generally Katz* v. *United States,* 389 U.S. 347 (1967). They have virtually no expectation of privacy in records and paraphernalia which they exclusively maintain in compliance with the Act. *Youghiogheny and Ohio Coal Company* v. *Morton,* 364 F. Supp. at 51 n. 5. Therefore, the quantum of probable cause required to sustain the searches here need not be as great as it might have to be if the same intrusions were contemplated in a less regulated industry.

The Supreme Court has permitted substantial intrusions within federally licensed commercial premises *without* a warrant where "regulatory inspections further urgent federal interests, and the possibilities of abuse and the threat to privacy are not of impressive dimensions," *United States* v. *Biswell,* 406 U.S. 311, 317 (1972). These routine, unannounced inspections have been authorized by federal statutes similar in scope and purpose to the Act in that they invoke the police power to protect the public welfare. *Colonade Catering Corp.* v. *United States,* 397 U.S. 72 (1970).[11] Although investigative searches of mine operator records may exceed the scope of judicially condoned warrantless inspections, we do not believe that the difference is sufficiently great to warrant a quantum leap to a criminal probable cause standard. An administrative showing should suffice to protect the legitimate privacy expectations of mine operators.

We question the practicality of imposing a double standard of review where search warrant applications

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11. The constitutionality of inspections of commercial premises without a warrant under Section 657 of Occupational Health and Safety Act of 1970, 19 U.S.C. §*651 et seq.,* is current before the Supreme Court in the case of *Marshall* v. *Barlow's Inc.,* No. 76-1143, 21 CRIM L. REP. 4021 (April 20, 1977).

are in furtherance of Section 813 investigations. If the Government's burden of pursuasion significantly increases when it candidly discloses its criminal leads, it will have incentive to withhold this information by couching all of its warrant requests in terms of administrative necessity. In those cases in which criminal suspicions are invoked by the proffered administrative rationale, the magistrate may find it exertmely (sic) difficult to select the appropriate standard of review. Any investigation initiated to secure compliance with the Act has potential criminal overtones. Section 819 makes willful non-compliance or fraud criminally actionable. Prosecution of all infractions is not a foregone conclusion, however, because the Secretary has inherently broad discretion to bypass criminal sanctions in favor of civil penalties. In the context of regulatory enforcement, we are loath to attribute conclusive legal significance to the apparent focus of an investigation. The magistrate's task will be expedited and the opportunity for reversible error substantially reduced if all Section 813 search warrant applications are subject to a uniform, administrative standard of review, whether or not criminal violations of the Act are suspected.

We need not dwell on the subtleties of the Government's two supporting affidavits to satisfy ourselves that they provided sufficient administrative probable cause to issue the six search warrants. Read together under the authority of *United States* v. *Serao,* 367 F.2d 347, 349 (2nd Cir. 1966), the affidavits vividly describe an ex-employee's personal involvement in a system implemented by the Company to defeat the regulatory intent

of Section 842 of the Act. [12] The informant's statements to federal authorities recount other information supplied to him by two identified co-workers who also admit their participation in the scheme. Through the informant, these technicians allege that the illegal practices, in which they play a key role, are common to a number of Company mines, including the locations actually searched. In addition, one of the affiants, a federal mine safety inspector, describes recent observations, made by him in one of the Company's mine offices, which tend to confirm the continuing nature of the violations.[13]

To a reasonably prudent person this information suffices to implicate the Company and a number of its employees in a course of conduct intended to compromise the working conditions of its miners. Indications of such flagrant non-compliance demand a prompt administrative response, even in the absence of criminal violations. Where the physical well-being of hundreds of miners may be jeopardized if warrants are denied, we remain unconvinced that a confidential informant's tip must be subjected to an *Aguilar-Spinelli* analysis of reliability.

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12. The two affidavits were formally submitted in support of only one warrant application. The other five applications exclusively relied upon one of the two affidavits, although all of the applications were *contemporaneously* presented to the magistrate for review. Under *Serao,* we believe we are justified in concluding that the magistrate was privy to the information contained in both affidavits before ruling on any of the related applications.

13. The inspector saw a posted list of "voided" sampling cassettes and a brown book in one of the suspect mine offices during a routine inspection. Both of these items were described by the informant as instrumental in the illegal scheme.

The legal basis for this seems particularly suspect in this case where the informer is an ex-employee of the mine operator. The Act expressly authorizes a "representative of the miners" who "has reasonable grounds to believe that a violation of a mandatory health or safety standard exists" to obtain an immediate inspection by giving appropriate written notice. 30 U.S.C. § 813(g). The informant here served as the putative miner's representative who provided these "reasonable grounds." Therefore, the magistrate properly granted the warrant requests.

We conclude that the district court erred in failing to perceive the administrative character of the search warrants. By resorting to an overly restrictive standard of review, the court failed to give effect to the policy objectives of the Act. We hold that warrant applications submitted under the authority of 30 U.S.C. § 813 should be scrutinized under an administrative standard of probable cause. *See* v. *City of Seattle, supra.* As was done in this case, warrants actually issued should be carefully tailored, by limiting the items to be seized, to prevent the abuses inherent in "general, exploratory rummaging in a [company's] belongings." *Coolidge* v. *New Hampshire,* 403 U.S. 443, 467 (1971).

Reversed and remanded for further proceedings.

ENGEL, Circuit Judge, concurring.

While I find myself in general agreement with much of the majority opinion, certain issues relating to administrative searches and seizures covered therein are sufficiently troublesome to persuade me that we should save their resolution until the case arises which demands it. Since I am fully satisfied that the government's affidavits meet the more stringent standards of *Aguilar* and *Spinelli* and since this is sufficient to uphold the search and seizure in any event, I concur in reversal and remand.

APPENDIX B

No. 76-2518

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA,
Plaintiff-Appellant,
v.
CONSOLIDATION COAL COMPANY,
Defendant-Appellee.

} Order

Before: CELEBREZZE and ENGEL, Circuit Judges, and CECIL, Senior Circuit Judge.

[Filed: September 16, 1977, John P. Hehman, Clerk]

Appellee filed a petition for rehearing with a request for rehearing en banc. No judge of this Court having moved for a rehearing en banc, the petition to rehear has been referred to the hearing panel.

Upon consideration, the Court being advised, it is ORDERED that the petition for rehearing be denied.

ENTERED BY ORDER OF THE COURT.
JOHN P. HEHMAN (Signed)
Clerk

APPENDIX C

No. 76-2518

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellant, v. CONSOLIDATION COAL COMPANY, a Corporation; ROBERT LASICK, RICHARD SCHRICKEL, FRANCIS LEO MARKS, RAYMOND ZITKO, Individuals, Defendants-Appellees.	Order

[Filed: September 28, 1977, John P. Hehman, Clerk]

Consolidation Coal Company, Defendant-Appellee moves this Court pursuant to Rule 41(b) FRAP to stay the issuance of its Mandate, pending application to the Supreme Court of the United States for a writ of Certiorari,

Upon due consideration said motion be and it is hereby granted.

ANTHONY J. CELEBREZZE (Signed)
JUDGE, U. S. COURT OF APPEALS
FOR THE SIXTH CIRCUIT
9-26-77.

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
For the Southern District of Ohio
Eastern Division

United States of America, Plaintiff v. Darrell Hazelwood, et al., Defendants	Criminal Case No. 75-97

Memorandum and Order

Defendants Consolidated [sic] Coal Company (hereinafter "Consol") and eight of its agents and employees[1] are variously charged in a 172-count indictment with conspiring to defraud the government and to violate the Federal Coal Mine Health and Safety Act in violation of 18 U.S.C. §371; with knowingly making false statements and representations in "mine data cards" filed with the Department of the Interior in violation of 30 U.S.C. §819(d); with willfully violating specified mandatory health standards in violation of 30 U.S.C. §819(b); and with knowingly authorizing, ordering, and carrying out violations of the mandatory health standards by Consol in violation of 30 U.S.C. §819(c). On September 12, 1975, defendants entered pleas of not

1. The individually named defendants are Darrell Hazelwood, Francis Leo Marks, Raymond J. Zitko, Robert Lasick, Richard Schrickel, Samuel Kirkland, Paul R. Kidney and James Kull.

guilty to all counts. Defendants Consol, Raymond Zitko, Paul R. Kidney and Robert Lasick move the Court for an order suppressing various items of property taken pursuant to warrants from certain buildings and mines belonging to Consol. Materials were seized from the following eight locations:

1. The mine office, Franklin No. 25 coal mine of Consolidation Coal Company, Ohio State Route 149, New Athens, Harrison County, Ohio;

2. The Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio;

3. The mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio;

4. The mine office, Ross Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale, Harrison County, Ohio;

5. The mine office, Oak Park No. 7 coal mine, of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio;

6. The mine office, Friendship Park Highwall No. 15 coal mine, of Consolidation Coal Company, Ohio State Route 151, Smithfield, Jefferson County, Ohio;

7. The Reclamation Services Mine 60 office, a white single story wooden building of Consolidation Coal Company, about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio;

8. The environmental building, a white building of Consolidation Coal Company, located about 225 feet from Ohio State Route 9, approximately 3 miles south of Cadiz, Harrison County, Ohio.

Since the government has represented that it will not use materials seized at two of the locations — — the Reclamation Services Mine 60 office and the environmental building — — the Court considers the motion to suppress as to the searches at these two locations to be moot.

Further, the Court will at this time only consider the motion to suppress of defendant Consol. Three individual defendants, Raymond Zitko, Paul R. Kidney, and Robert Lasick have moved to join in Consol's motion which requests the government challenges, asserting that these defendants lack standing by failing to be a "person aggrieved" within the meaning of Rule 41, Fed. R. Crim. P. See also *Jones* v. *United States,* 362 U.S. 257, 261 (1960) wherein the Supreme Court of the United States stated, "In order to qualify as a 'person aggrieved by an unlawful search and seizure' one must have been a victim of a search and seizure, one against whom the search was directed, as distinguished from one who claims prejudice only through the use of evidence gathered as a consequence of a search or seizure directed at someone else." When the standing of a defendant is challenged, the burden is upon him, to establish his right to challenge the legality of a search, see *Jones* v. *United States,* 362 U.S. at 261. Since the defendants have not replied to the government's challenge to their standing and hence no facts have been brought forth, the record is simply not sufficient at this point in the proceedings for the Court

to rule on a motion to suppress by these defendants. Accordingly, the motion to suppress of Raymond Zitko, Paul R. Kidney and Robert Lasick is DENIED without prejudice.

The nine warrants involved herein were issued upon the affidavit of Mr. William A. Holgate, a health specialist employed by the Mining Enforcement and Safety Administration. In addition, one of the nine warrants, namely that used to search the premises at the Franklin No. 25 Mine, was also supported by the affidavit of Mr. Thomas Jeskey, a Federal Mine Inspector also with MESA. The Court will first consider the validity of the searches conducted solely upon the Holgate affidavit and then consider that of Franklin No. 25 Mine based upon both affidavits.

I

The Holgate affidavit states as follows:

William A. Holgate, U. S. Department of the Interior, Washington, D. C., being duly sworn according to law, deposes and says:

1. I am a health specialist, employed by the Mining Enforcement and Safety Administration, United States Department of the Interior. I have personal knowledge of the facts and circumstances stated herein.

2. On May 15, 1974, I went to St. Clairsville, Ohio, where I met with an individual who had been employed by Consolidation Coal Company, at the Franklin No. 25 mine, and Franklin Highwall mine, located in or near New Athens, Harrison County, Ohio. Said individual informed me that he spoke with personal knowledge.

3. Said individual stated to me that it is the practice at said mine to tamper with cassettes the operator must submit to Mining Enforcement and Safety Administration in connection with the respirable dust sampling program required by the Federal Coal Mine Health and Safety Act of 1969, and the regulations promulgated thereunder. He stated that he was instructed by his superiors to maintain a supply of extra cassettes which contained respirable dust samples collected under controlled conditions. These samples were collected on idle shifts and they do not represent the actual mining environment in which miners were actually working.

4. He further stated that he was instructed to send all cassettes actually collected in the respirable dust program to the Company's laboratory in Georgetown, Ohio. Jim Kull and Scot McNickles, technicians at this laboratory would open the cassettes and weigh the capsule containing the dust sample. If the sample weighed in excess of the permitted weight, either the sample would be voided or the inner capsule would be opened and an amount of the respirable dust would be discarded. If the sample was voided, a "controlled" or fictitious sample would be substituted. In submitting the substitute samples, the mine data cards which are required to be submitted to Mining Enforcement and Safety Administration along with the cassettes would bear the forged signature of the miner allegedly sampled.

5. Said individual also stated that a record indicating the cassette numbers of all samples actually collected and those samples which were voided was maintained on a bulletin board in the environ-

mental office at the mine. He further stated that a brown book containing a listing of voids and of "fictitious" samples was maintained and kept in a desk drawer in said office, and that the actual "fictitious" samples were kept in a drawer in said office.

6. Said individual also stated that Jim Kull and Scot McNickles told him that similar practices were employed at other mines in the Central Division, Consolidation Coal Company.

7. From the information obtained, affiant believes that the above-described books, records, and fictitious samples are being kept at the environmental office of said mines and that said articles would show that agents of the operator knowingly ordered or carried out violations of the Federal Coal Mine Health and Safety Act of 1969, and the regulations promulgated thereunder. Affiant further believes that such books, records, and fictitious samples would show that false statements, certifications, or representations were knowingly made in records or reports required to be filed or maintained pursuant to said Act and regulations promulgated thereunder.

As is apparent from a reading of the affidavit, the informant's tip is a necessary and crucial element in the finding of probable cause. Its sufficiency, therefore, must be judged under the two-pronged test first articulated by the Supreme Court in *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and subsequently explicated by later decisions. The *Aguilar* affidavit stated in relevant part that:

> Affiants have received reliable information from a credible person and do believe that heroin, marijuana, barbituates and other narcotics and narcotic paraphernalia are being kept at the above described premises for the purpose of sale and use contrary to the provisions of law.

The Supreme Court found that the *Aguilar* affidavit was phrased in general, conclusionary terms and failed to furnish a basis upon which a neutral and detached magistrate could "judge for himself the persuasiveness of the facts relied on . . . to show probable cause." *Aguilar* v. *Texas,* 378 at 114. The Court then proceeded to articulate two factors which it considered to be essential if an affidavit was to pass constitutional muster:

> [T]he magistrate must be informed of some of the underlying circumstances from which the informant concluded that the narcotics were where he claimed they were, and some of the underlying circumstances from which the officer concluded that the informant . . . was 'credible' or his information 'reliable.'

The Supreme Court found the affidavit in *Aguilar* wanting because it did not even contain an "affirmative allegation" that the affiant's unidentified source "spoke with personal knowledge." Id. at 113.

In *Spinelli* v. *United States,* 393 U.S. 410 (1969), the Supreme Court again considered the constitutional sufficiency of a supporting affidavit[2] for a search warrant.

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2. The affidavit in *Spinelli* stated:

> I, Robert L. Bender, being duly sworn, depose and say that I am a Special Agent of the Federal Bureau of Investigation, and as such am authorized to make searches and seizures.
>
> That on August 6, 1965, at approximately 11:44 a.m., William Spinelli was observed by an Agent of

The *Spinelli* affidavit told of FBI surveillance of seemingly innocent activity and then simply stated the FBI was "informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of telephone which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136." The informant's tip was found to be constitutionally insufficient

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the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3-649, onto the Eastern approach of the Veterans Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

That on August 11, 1965, at approximately 11:16 a.m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving a 1964 Ford convertible, Missouri license HC3-649, onto the Eastern approach of the Eads Bridge leading from East St. Louis, Illinois, to St. Louis, Missouri.

Further, at approximately 11:18 a.m. on August 11, 1965, I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, at approximately 4:40 p.m. on August 11, 1965, I observed the aforesaid Ford convertible, bearing Missouri license HC3-649, parked in a parking lot used by residents of The Chieftain Manor Apartments, approximately one block east of 1108 Indian Circle Drive.

On August 12, 1965, at approximately 12:07 p.m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid 1964 Ford convertible onto the Eastern approach of the Veterans Bridge from East St. Louis, Illinois, in the direction of St. Louis, Missouri.

Further, on August 12, 1965, at approximately 3:46 p.m., I observed William Spinelli driving the aforesaid 1964 Ford convertible onto the parking

under the *Aguilar* standards. Although the affiant had sworn the informant was "reliable," no basis had been provided in the affidavit to support this conclusion and thus there was no way for a magistrate to form his own neutral and detached appraisal. Nor, said the Court, was the other test of *Aguilar* satisfied. The affidavit did not contain a statement of the underlying circumstances from which the informant had come to his conclusion that Spinelli was engaging in a bookmaking operation.

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lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, on August 12, 1965, at approximately 3:49 p.m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the front entrance of the two-story apartment building located at 1108 Indian Circle Drive, this building being one of The Chieftain Manor Apartments.

On August 13, 1965, at approximately 11:08 a.m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation driving the aforesaid Ford convertible onto the Eastern approach of the Eads Bridge from East St. Louis, Illinois, heading towards St. Louis, Missouri.

Further, on August 13, 1965, at approximately 11:11 a.m., I observed William Spinelli driving the aforesaid Ford convertible from the Western approach of the Eads Bridge into St. Louis, Missouri.

Further, on August 13, 1965, at approximately 3:45 p.m., I observed William Spinelli driving the aforesaid 1964 Ford convertible onto the parking area used by residents of The Chieftain Manor Apartments, said parking area being approximately one block from 1108 Indian Circle Drive.

Further, on August 13, 1965, at approximately 3:55 p.m., William Spinelli was observed by an Agent of the Federal Bureau of Investigation entering the corner apartment located on the second floor in the

There was no way of knowing how the informant had obtained any information regarding Spinelli; no indication, for example, that he had ever personally observed the alleged bookmaking operations. Since the remainder of the affidavit also failed to support a finding of reliability for the informant, the Supreme Court concluded, as it had in *Aguilar,* that there was no basis for a finding of probable cause.

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southwest corner, known as Apartment F, of the two-story apartment building known and numbered as 1108 Indian Circle Drive.

On August 16, 1965, at approximately 3:22 p.m., I observed William Spinelli driving the aforesaid Ford convertible onto the parking lot used by the residents of The Chieftain Manor Apartments approximately one block east of 1108 Indian Circle Drive.

Further, an Agent of the F.B.I. observed William Spinelli alight from the aforesaid Ford convertible and walk toward the apartment building located at 1108 Indian Circle Drive.

The records of the Southwestern Bell Telephone Company reflect that there are two telephones located in the southwest corner apartment on the second floor of the apartment building located at 1108 Indian Circle Drive under the name of Grace P. Hagen. The numbers listed in the Southwestern Bell Telephone Company records for the aforesaid telephones are WYdown 4-0029 and WYdown 4-0136.

William Spinelli is known to this affiant and to federal law enforcement agents and local law enforcement agents as a bookmaker, an associate of bookmakers, a gambler, and an associate of gamblers.

The Federal Bureau of Investigation has been informed by a confidential reliable informant that William Spinelli is operating a handbook and accepting wagers and disseminating wagering information by means of the telephones which have been assigned the numbers WYdown 4-0029 and WYdown 4-0136.

While *Aguilar* and *Spinelli* furnish examples of affidavits held to be insufficient, *United States* v. *Harris,* 403 U.S. 573 (1971), analyzes an affidavit found to provide a basis for a magistrate's determination of probable cause. In *Harris* the Court again grappled with "the recurring question of what showing is constitutionally necessary to satisfy a magistrate that there is a substantial basis for crediting the report of an informant known to police, but not identified to the magistrate, who purports to relate his personal knowledge of criminal activity." *United States* v. *Harris,* 403 U.S. at 575. The warrant in *Harris* had been issued upon an affidavit which stated:

> Roosevelt Harris has had a reputation with me for over 4 years as being a trafficker of nontaxpaid distilled spirits, and over this period I have received numerous information [sic] from all types of persons as to his activities. Constable Howard Johnson located a sizeable stash of illicit whiskey in an abandoned house under Harris' control during this period of time. This date, I have received information from a person who fears for their [sic] life and property should their name be revealed. I have interviewed this person, found this person to be a prudent person, and have, under a sworn verbal statement, gained the following information: This person has personal knowledge of and has purchased illicit whiskey from within the residence described, for a period of more than 2 years, and most recently within the past 2 weeks, has knowledge of a person who purchased illicit whiskey within the past two days from the house, has personal knowledge that the illicit whiskey is consumed by purchasers in

the outbuilding known as and utilized as the 'dance hall,' and has seen Roosevelt Harris go to the other outbuilding, located about 50 yards from the residence, on numerous occasions, to obtain the whiskey for this person and other persons.

Reading the above statement in light of the *Aguilar* requirements that there be a factual basis for both the informant's information and his credibility or reliability, several factors are present in it which were not present in the *Aguilar* and the *Spinelli* affidavits. First, the informant had personal and recent observations of the criminal activity involved, showing that the informant had acquired the information in some reliable fashion. Moreover, there is also present a substantial basis for judging the reliability of the informant. The "substantial basis" approach for determining whether hearsay in an affidavit should be credited was first articulated in *Jones* v. *United States,* 362 U.S. 257 (1960). As the Supreme Court noted in *Harris*: "In determining what quantum of information is necessary to support a belief that an unidentified informant's information is truthful, *Jones* v. *United States*[3] is a suitable benchmark." The

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3. The *Jones* affidavit was as follows:

Both the aforementioned persons are familiar to the undersigned and other members of the Narcotic Squad. Both have admitted to the use of narcotic drugs and display needle marks as evidence of same.

This same information, regarding the illicit narcotic traffic, conducted by [the defendant] has been given to the undersigned and to other officers of the narcotic squad by other sources of information.

Because the source of information mentioned in the opening paragraph has given information to the undersigned on previous occasion and which was correct, and because this same information is given by other sources does believe that there is now illicit narcotic drugs being secreated [sic] in the above apartment.

Court found a substantial basis for crediting the hearsay in *Jones* because the informant had previously given accurate information, his story was corroborated by "other" sources, and the defendant was a known (by the affiant) user of narcotics. In *Harris* a substantial basis was found because again the informant was relating personal observations, there was corroborating information within affiant's own knowledge, and there was the additional factor that the informant's statements were against his penal interest.[4] Because there was in the affidavit some explication of the "underlying circumstances" of the informant's information and of his reliability, the Court concluded that a magistrate could properly find probable cause for the issuance of a warrant.

Turning now to the affidavit in the instant case, I first consider whether there exists on the face of the affidavit a factual basis to establish the informant's credibility or reliability. The government argues that the credibility of the informant is established in two ways. First, according to the government, the informant is making declarations against his penal interest. Although as noted above, statements against penal interest were the subject of discussion in the *Harris* decision, it is important to note that this additional factor of reliability was credited by only four of the five justices

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4. It should be noted that only four of the five justices who joined in the majority opinion concurred in finding this an additional factor of reliability.

who joined in the majority opinion. Therefore this Court hesitates to find such a factor a significant indicia of reliability absent other compelling factors. More importantly, however, the Court does not read the declarations of the informant to be in fact against his penal interest. The informant merely states that he was instructed to do certain things ("to maintain a supply of extra cassettes which contained respirable dust samples collected under controlled conditions"; "to send all cassettes actually collected in the respirable dust program to the Company's laboratory"). There is no admission that the informant actually participated in any illegal activity. Accordingly, even assuming a declaration against interest is a factor of reliability, I do not find it to be present in the Holgate affidavit.

The government next contends that the detail of the informant's information is an indicator of his reliability. Such a factor was found significant in *Draper* v. *United States,* 358 U.S. 307 (1959). In *Draper* the informant had described "with minute particularity" the physical appearance and the activities of the party searched. *Spinelli* v. *United States,* 393 U.S. at 417. Additionally, the agents had personally verified each of the details of the information except that Draper possessed the alleged heroin. This Court does not believe that the Holgate affidavit contains the detail of information relied upon by the Court in *Draper*. Nor is there independent corroboration by affiant Holgate as to any information provided by the informant. The Court concludes, then, that the factors of reliability of the informant asserted by the government do not exist. Nor is the Court able to find any other basis for concluding the informant is reliable. He apparently was not known to the affiant and had not previously provided reliable information.

Turning now to the question of whether the Holgate affidavit contains a factual basis for the informant's information, I first note that the informant purports to speak with personal knowledge. However, there is some difficulty determining what parts of the affidavit are based upon personal knowledge. Certainly it is clear that the relating of the instructions to the informant himself stem from personal knowledge. It is not so clear, on the other hand, how the informant comes by the information concerning Jim Kulls and Scot McNickles' activities; or how he came by his information regarding the record of the voided samples and the listing of void and fictitious samples in a brown book. Although the affidavit indicates that the informant "had been employed by Consolidation Coal Company" there is no indication at what time period the informant was employed at Consol. Consequently, there is no way to determine whether the information is "fresh," so to speak, or "stale." Further, informant's employment, whenever it was, was at Franklin No. 25 mine, and the affidavit was used to obtain search warrants for various other mine facilities. In this regard, the affidavit merely states that "said individual [the informant] also stated that Jim Kull and Scot McNickles told him that similar practices were employed at other mines in the Central Division, Consolidation Coal Company." No factual basis is set forth as to how Kull and McNickles came by this information or as to the reliability or credibility of Kull and McNickles. In short, then, there is only a general, conclusionary statement similar to that found defective in *Aguilar*.

It is perhaps appropriate to comment upon one final problem presented by the Holgate affidavit. The very heart of the alleged illegal activity is to be found in para-

graph 4. Yet this paragraph clearly points up the defects of the affidavit as a whole. There is no indication how the informant came by his information regarding the activities of Kull and McNickles. Moreover, assuming it was from these two individuals, it is necessary that there be some basis for determining the reliability of Kull and McNickles. Because the Holgate affidavit fails to explicate the "underlying circumstances" of the informant's information and of his reliability, this Court concludes that it did not furnish probable cause for the issuance of the warrants used to search the following premises:

1. The Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio;
2. The mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio;
3. The mine office, Rose Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale, Harrison County, Ohio;
4. The mine office, Oak Park No. 7 coal mine, of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio;
5. The mine office, Friendship Park Highwall No. 15 coal mine, of Consolidation Coal Company, Ohio State Route 151, Smithfield, Jefferson County, Ohio.

Accordingly, the property seized from the above premises must be suppressed.

II

The Court will now turn to a consideration of the search of the office of Franklin No. 25 coal mine which as noted above was based upon the affidavit of Thomas Jeskey in addition to the affidavit of William Holgate. The Jeskey affidavit states as follows:

> Thomas A. Jeskey, U. S. Department of the Interior, St. Clairsville, Ohio, being duly sworn according to law, deposes and says:
>
> 1. I am a Federal Coal Mine Inspector, employed by the Mining Enforcement and Safety Administration, United States Department of the Interior. I have personal knowledge of the facts and circumstances stated herein.
>
> 2. On May 15, 1974, I attended a meeting at St. Clairsville, Ohio, between representatives of the United States Department of the Interior and an individual who had been employed by Central Division, Consolidation Coal Company, Franklin No. 25 mine, located in or near New Athens, Harrison County, Ohio.
>
> 3. Said individual stated in my presence that it is the practice at said mine to tamper with cassettes the operator must submit to Mining Enforcement and Safety Administration in connection with the respirable dust sampling program required by the Federal Coal Mine Health and Safety Act of 1969. Said individual stated that these practices include the removal and "voiding" of actual cassette samples and the substitution of fictitious samples. Said in-

dividual further stated a record of the cassette numbers of samples collected but voided was maintained on the bulletin board at the environmental office of said mine. He further stated that a brown book containing a listing of the voided and of fictitious samples was maintained and kept in a desk drawer in said office.

4. On May 16, 1974, acting upon the information contained in the preceding paragraph, I proceeded to the site of said mine and at approximately 7:00 a.m. I met Mr. Frank Kolat, federal coal mine inspector in the environmental office of the mine. A short time later Mr. Sam Kirkland, the environmental technician for the mine, entered this office. The environmental office of said mine is made available to federal mine inspectors for their use when they are present to conduct an inspection of the mine.

5. After I had talked with Mr. Kirkland for a short period he left the environmental office to go about his duties. In his absence I observed at least six separate sheets of paper on the bulletin board. Attached as Exhibit No. 1 is a Xerox copy of a list which had been supplied by the former employee of the said mine. The lists I observed on May 16 on the bulletin board in the environmental office of said mine were substantially identical in form and similar in content to Exhibit No. 1. These papers listed respirable dust cassettes apparently used in said mine by identification number, date, and weight of sample. These listed at least six cassette numbers as "void," namely, 15684738, 15743878, 15744164, 15744264, 15744170, and 15744071.

6. Before accompanying Mr. Kolat and me on the inspection of the mine, Mr. Kirkland returned to the environmental office. At that time I observed him remove from the desk in that office a hard bound book, approximately 3 inches by 6 inches in size, and stuff it in the front of his coveralls. He did not tell me what the book contained and I did not ask him. Mr. Kirkland then accompanied Mr. Kolat and me on the mine inspection.

7. At approximately 1:30 p.m. after completing the mine inspection, I left the mine premises.

The inquiry for the Court is whether these two affidavits together meet the tests of *Aguilar* and its progeny discussed above. The government argues, and the Court believes correctly so, that a basis exists for crediting the reliability of the informant. Such a basis arises from Mr. Jeskey's corroboration of certain items of information provided by the informant. The informant's information as to the existence of sheets listing void samples and of a book listing void and fictitious samples was verified by the independent personal observation of Mr. Jeskey who can then be said to have verified the credibility of the informant. The idea here is that having been shown to be reliable about some facts it is reasonable to assume he will be reliable regarding other facts. See *Draper* v. *United States,* 358 U.S. 307 (1959). Although the court believes this to be a close question, it nonetheless deter-

mines that a sufficient basis does exist for concluding that the informant is credible.

An even more difficult question exists concerning the reliability of the information contained in the affidavits; that is, do the affidavits contain some of the "underlying circumstances" from which the informant concluded that a practice existed to tamper with dust sample cassettes required to be submitted to the Mining Enforcement and Safety Administration. Although it is stated that the informant had been employed at Franklin No. 25 mine, as noted above, there is no indication at what period of time this employment occurred and thus this fact is of no real aid in judging the reliability of the information. The informant's information as to what his superiors told him can be credited but these facts standing alone do not furnish probable cause. Certain other facts were corroborated by Mr. Jeskey, but again, these facts do not, standing alone or in tandem with the information as to the instructions from informant's superiors, establish probable cause. Although obtained in a seemingly reliable fashion, this information is neutral, having no probative effect on whether any alleged illegality was in fact occurring. In this respect these facts may be likened to those contained in the *Spinelli* affidavit detailing the FBI's surveillance of seemingly innocent activity on the part of Spinelli. See *Spinelli* v. *United States,* 393 U.S. 410, 420-422 (1969). As the Supreme Court observed: "[T]he allegations detailing the FBI's surveillance of Spinelli and its investigation of the telephone company records contain no suggestion of criminal conduct when taken by themselves — — and they are not endowed with an aura of suspicion by virtue of the informer's tip." *Spinelli* v. *United States,* 393 U.S. at 418.

The crucial part of the affidavits is the relating of the activities of Kull and McNickles at the Georgetown laboratory and, as discussed above, there is simply no indication as to how this information was obtained. Informant did not state he personally observed these activities, and there is no indication that Kull and McNickles personally told the informant about their activities; even assuming that they did, a myriad of different problems would arise regarding the reliability of these individuals. The Court concludes, then, that the search of Franklin No. 25 mine must also fail and the results obtained therefrom must be suppressed.

Finding as I do, for the reasons stated in the above memorandum, that the respective affidavits used for the searches involved herein fail to establish probable cause, it is ORDERED that the motion for suppression submitted by Consolidation Coal Company be, and it hereby is, GRANTED.[5]

Robert M. Duncan, Judge
United States District Court

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5. Because of the result reached today, the Court does not believe any necessity exists for dealing with the issues of procedural irregularity under Rule 41, Fed. R. Crim. P. raised by Consol's motion. Should a need subsequently arise for consideration of these matters, a hearing can be held at some time prior to the date of trial.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
EASTERN DIVISION

United States of America, Plaintiff v. Darrell Hazelwood, et al., Defendants	Criminal Case No. 75-97

Memorandum and Order

The government has moved for reconsideration of this Court's Memorandum and Order of June 11, 1976, granting defendant Consolidated [sic] Coal Company's motion to suppress evidence. The government presents three grounds for reconsideration. The Court has previously ruled that the affidavits of Messrs. Holgate and Jeskey are not sufficient to pass constitutional muster under the two-prong test of *Aguilar* v. *Texas,* 378 U.S. 108 (1964) and *Spinelli* v. *United States,* 393 U.S. 410 (1969). Even if the two affidavits are read in tandem, as urged by the government, the Court concludes that the affidavits fail to establish probable cause for the issuance of the warrants.

The government has raised the additional ground for reconsideration that the searches and seizures of the various offices are authorized without warrants by the Federal Coal Mine Health and Safety Act, 30 U.S.C. §813(a). The government also argues that even in the

absence of probable cause, the exclusionary rule should not be applied in light of the good faith of the federal agents in obtaining and executing the search warrants.

Although the Federal Coal Mine Health and Safety Act authorizes certain warrantless searches as regulatory exceptions to the Fourth Amendment, these exceptions are limited to the specific authorization of the statute. *United States* v. *Biswell,* 406 U.S. 311 (1972); *Youghiogheny and Ohio Coal Company* v. *Morton,* 364 F. Supp. 45 (S.D. Ohio 1973). Warrantless searches are *per se* unreasonable subject to a few well delineated exceptions. *Katz* v. *United States,* 389 U.S. 347 (1967). In *Youghiogheny* the court limited the scope of the regulatory exception to searches "directly related to ensuring compliance with the purpose of the legislation." 364 F. Supp. at 50, n.4. The court further found an expectation of privacy outside the permissible scope of warrantless searches in the offices on the mine property, and that "the Act does not authorize these inspectors to rummage in any wholesale way or to initiate a general search of the mine operator's offices" for the records required to be kept under the Act. 364 F. Supp. at 51 n.5. This Court finds that these searches are not within the regulatory exception of 30 U.S.C. §813(a). It appears that the searches were undertaken in preparation for criminal prosecutions and not incident to the purpose and within the scope of the Act.

The good faith of federal agents does not cure a violation of the Fourth Amendment. Although the exclusionary rule has, as one of its purposes, the discouragement of improper police conduct, it has also as a purpose the prevention of a criminal conviction based upon illegally obtained evidence. The prevention of prejudice

to the defendant is of at least equal importance with the deterrence of improper police conduct. See, *United States* v. *Karatharos,* 531 F.2d 26, 32-34 (2d Cir. 1976).

For these reasons it is ORDERED that the motion for reconsideration submitted by the government be, and it hereby is, DENIED.

Robert M. Duncan, Judge
United States District Court

APPENDIX F

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrate's Docket No. .....

Case No. .....

UNITED STATES OF AMERICA v. The mine office, Franklin No. 25 coal mine of Consolidation Coal Company, Ohio State Route 149, New Athens, Harrison County, Ohio	SEARCH WARRANT M2 74-104

[Filed: May 28, 1974]

To Any Special Deputy U.S. Marshal

Affidavit having been made before me by William A. Holgate and Thomas A. Jeskey that they have reason to believe[1] that on the premises known as the mine office, Franklin No. 25 coal mine of Consolidation Coal Company Ohio State Route 149, New Athens, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples, which are used or intended to be used for the purpose of evading the respirable coal

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1. The Federal Rules of Criminal Procedure provides: "The warant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations; 30 U.S.C. 819(b), (c), (d); 30 U.S.C. 842; 30 C.F.R. Part 70 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 21st day of May, 1974.

JOSEPH FREEDMAN (signed)
U. S. Magistrate.

RETURN

I received the attached search warrant May 21, 1974, and have executed it as follows:

On May 22, 1974 at 9:00 o'clock A.M., I searched the premises described in the warrant and I left a copy of the warrant with Sam Kirkland together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1. Data sheet for M. West section (052) 9:03 A.M. Dates 3/21 to 5/21
2. Data sheet for 2 Left section (056) 9:05 A.M. Dates 2/1 to 4/16

3. Data sheet for 3 left section (058) 9:07 A.M. Dates 1/4 to 5/21
4. Data sheet for 5 left section (062) 9:09 A.M. Dates 3/5 to 5/21
5. Data sheet for 6 left section (064) 9:10 A.M. Dates 3/7 to 5/21
6. Data sheet for 7 left section (066) 9:11 A.M. Dates 3/11 to 5/21
7. Data sheet for 1 North section (200) 9:12 A.M. Dates 2/27 to 5/1
8. Data sheet for 1 lt.-1 No. section (201) 9:13 A.M. Dates 3/14 to 5/21
9. Data sheet for 2 lt. No. (203) 9:14 A.M. Dates 3/5 to 5/20
10. Memo book (3" x 5" Blue) 9:16 A.M.
11. Used cassettes & data card (15744269) 9:17 A.M.
    Used cassettes & data card (15744065) 9:19 A.M.
    " " " " " (15744140) 9:20 A.M.
    " " " " " (15744230) 9:21 A.M.

(See attached continuation sheet)

This inventory was made in the presence of Sam Kirkland and Frank Homko.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

THOMAS A. JESKY (signed)

Subscribed and sworn to and returned before me this 22nd day of May, 1974.

JOSEPH FREEDMAN (signed)
U. S. Magistrate

M2 74-104

Continuation sheet 1

Used cassette & data card (15744246) 9:23 A.M.
" " " " " (15745498) 9:24 A.M.
" " " " " (15744078) 9:25 A.M.
" " " " " (15744133) 9:27 A.M.
" " " " " (15744070) 9:28 A.M.
" " " " " (15743953) 9:29 A.M.
" " " " " (15684897) 9:30 A.M.
" " " " " (15744100) 9:31 A.M.
" " " " " (15744268) 9:32 A.M.
" " " " " (15744225) 9:33 A.M.

Un-used cassette & data card (15745511) 9:34 A.M.

Un-used cassette & data card (15745407) 9:35 A.M.

Un-used cassette & data card (15745531) 9:36 A.M.

Un-used cassette & data card (15745526) 9:37 A.M.

Un-used cassette & data card (15745474) 9:38 A.M.

Un-used cassette & data card (15745429) 9:39 A.M.

Un-used cassette & data card (15745479) 9:40 A.M.

Un-used cassette & data card (15745402) 9:41 A.M.

Un-used cassette & data card (15745480) 9:42 A.M.

Un-used cassette & data card (15745713) 9:42 A.M.

Un-used cassette & data card (15745612) 9:43 A.M.

Cassette signed data cards (15745426) 9:44 A.M.
" " " " (15745612) "
" " " " (15745754) 9:45 A.M.
" " " " (15745503) "
" " " " (15745465) "
" " " " (15745546) "

Level book (17707) Franklin #25 1974 (Light Brown covered) 9:57 A.M.

K&E Level book (820034) Dark brown 9:58 A.M.

Health Inspections — Franklin — Level book 9:59 A.M. Light Brown covered

1972 Level book (Light brown covered) 10:00 A.M.

1970-1971 (Level book) Light brown covered 10:02 A.M.

Level book (9293) Light brown covered 10:04 A.M.

Continuation sheet 2

17707

Fr. #25 Advance cycles (Light brown level book) 10:06 A.M.

Note pad No. 25 33-00963 Franklin No. 25 (yellow government pad) 10:22 A.M.

*Found in top desk drawer

Used cassette and data card (15745777) 10:23 A.M.

Used cassette and data card (15745719) 10:24 A.M.

Folder containing inter office communication sheets and data sheets 10:35 A.M.

Folder containing Dust Sample Compilation data sheets 10:39 A.M.

section 10L—1 No.

Manila

Folder section 81—1 No. Dust sample Compilation data sheets 10:41 A.M.

Folder section 9R—1 No. Dust sample Compilation data sheets 10:42 A.M.

Folder section 7L—1 No. Dust sample Compilation data sheets 10:43 A.M.

Folder section 9L—1 No. Dust sample Compilation data sheets 10:44 A.M.

Folder section 6R—1 south Dust sample Compilation data sheets 10:45 A.M.

Folder section 5R—1 So. Dust sample Compilation data sheets 10:46 A.M.

Folder section 7L—1 So. Dust sample Compilation data sheets 10:47 A.M.

Folder section 7L—1 So. Dust sample Compilation data sheets 10:47 A.M.

Folder section 6L—1 So. Dust sample Compilation data sheets 10:48 A.M.

Folder section 1 North Dust sample Compilation data sheets 10:48 A.M.

Folder section 11L—I North Dust sample Compilation data sheets 10:50 A.M.

Folder section Main west 35Y Miner Dust sample Compilation data sheets 10:51 A.M.

Folder section Haulage & Dumper Dust sample Compilation data sheets 10:53 A.M.

Folder section Bottom end of shop Dust sample Compilation data sheets 10:55 A.M.

Folder section Old section reports Dust sample Compilation data sheets 11:01 A.M.

Folder section Frank No. 25 (illegible) Report Dust sample Compilation data sheets 11:06 A.M.

Folder section Hi Wall Main East Dust sample Compilation data sheets 11:07 A.M.

[*Folder section Main East Dust sample Compilation data sheets*] Not pertinent F.H.*

File cabinet (Letters A thru Z) Card X containing respirable dust records 11:20 A.M.

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*Words in italic deleted by line in original return.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

UNITED STATES OF AMERICA v. The mine office, Franklin No. 25 coal mine of Consolidation Coal Company, Ohio State Route 149, New Athens, Harrison County, Ohio	AFFIDAVIT FOR SEARCH WARRANT M2 74-104

[Filed: May 28, 1974]

BEFORE Joseph J. Freedman First National Bank Bldg., Steubenville, Ohio

The undersigned being duly sworn deposes and says: That he has reason to believe[1] that on the premises known as the mine office, Franklin No. 25 coal mine, of Consolidation Coal Company, Ohio State Route 149, New Athens, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples, which

1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

are used or intended to be used for the purposes of evading the respirable coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations; 30 U.S.C. 819 (b), (c), (d); 30 C.F.R., Part 70; 30 U.S.C. 842.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE ATTACHED

WILLIAM A. HOLGATE (signed)
Signature of Affiant.

Special Deputy U.S. Marshal
Official Title if any.

Sworn to before me, and subscribed in my presence, May 21, 1974.

JOSEPH FREEDMAN (signed)
United States Magistrate.

M2 74-104

CITY OF STEUBENVILLE
SOUTHERN DISTRICT OF OHIO

AFFIDAVIT

[Filed: May 28, 1974]

William A. Holgate, U. S. Department of the Interior, Washington, D. C., being duly sworn according to law, deposes and says:

1. I am a health specialist, employed by the Mining Enforcement and Safety Administration, United States Department of the Interior. I have personal knowledge of the facts and circumstances stated herein.

2. On May 15, 1974, I went to St. Clairsville, Ohio, where I met with an individual who had been employed by Consolidation Coal Company, at the Franklin No. 25 mine, and Franklin Highwall mine, located in or near New Athens, Harrison County, Ohio. Said individual informed me that he spoke with personal knowledge.

3. Said individual stated to me that it is the practice at said mine to tamper with cassettes the operator must submit to Mining Enforcement and Safety Administration in connection with the respirable dust sampling program required by the Federal Coal Mine Health and Safety Act of 1969, and the regulations promulgated thereunder. He stated that he was instructed by his superiors to maintain a supply of extra cassettes which contained respirable dust samples collected under controlled conditions. These samples were collected on idle shifts and they do not represent the actual mining environment in which miners were actually working.

4. He further stated that he was instructed to send all cassettes actually collected in the respirable dust program to the Company's laboratory in Georgetown, Ohio. Jim Kull and Scot McNickles, technicians at this laboratory would open the cassettes and weigh the capsule containing the dust sample. If the sample weighed in excess of the permitted weight, either the sample would be voided or the inner capsule would be opened and an amount of the respirable dust would be discarded. If the sample was voided, a "controlled" or fictitious sample would be substituted. In submitting the substitute samples, the mine data cards which are required to

be submitted to Mining Enforcement and Safety Administration along with the cassettes would bear the forged signature of the miner allegedly sampled.

5. Said individual also stated that a record indicating the cassette numbers of all samples actually collected and those samples which were voided was maintained on a bulletin board in the environmental office at the mine. He further stated that a brown book containing a listing of voids and of "fictitious" samples was maintained and kept in a desk drawer in said office, and that the actual "fictitious" samples were kept in a drawer in said office.

6. Said individual also stated that Jim Kull and Scot McNickles told him that similar practices were employed at other mines in the Central Division, Consolidation Coal Company.

7. From the information obtained, affiant believes that the above-described books, records, and fictitious samples are being kept at the environmental office of said mines and that said articles would show that agents of the operator knowingly ordered or carried out violations of the Federal Coal Mine Health and Safety Act of 1969, and the regulations promulgated thereunder. Affiant further believes that such books, records, and fictitious samples would show that false statements, certifications, or representations were knowingly made in records or reports required to be filed or maintained pursuant to said Act and regulations promulgated thereunder.

WILLIAM A. HOLGATE (signed)

Sworn to and subscribed before me, a United States Magistrate, this 21st day of May, 1974.

JOSEPH J. FREEDMAN (signed)
United States Magistrate

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrate's Docket No. .....

Case No. .....

UNITED STATES OF AMERICA VS. The mine office, Franklin No. 25 coal mine of Consolidation Coal Company, Ohio State Route 149, New Athens, Harrison County, Ohio	AFFIDAVIT FOR SEARCH WARRANT M2 74-104

[Filed: May 28, 1974]

BEFORE Joseph J. Freedman, First National Bank Bldg., Steubenville, Ohio

The undersigned being duly sworn deposes and says:

That he has reason to believe[1] that on the premises known as the mine office, Franklin No. 25 coal mine of Consolidation Coal Company, Ohio State Route 149, New Athens, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely .....
exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples, which are used or intended to be

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1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

used for the purpose of evading the respirable coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations; 30 U.S.C. 819(b), (c), (d); 30 U.S.C. 842; 30 C.F.R. Part 70.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE ATTACHED

THOMAS A. JESKEY (signed)
Signature of Affiant.

Special Deputy U. S. Marshal
Official Title, if any.

Sworn to before me, and subscribed in my presence, May 21, 1974.

JOSEPH J. FREEDMAN (signed)
United States Magistrate.

M2 14-104

CITY OF STEUBENVILLE
SOUTHERN DISTRICT OF OHIO

AFFIDAVIT

Thomas A. Jeskey, U. S. Department of the Interior, St. Clairsville, Ohio, being duly sworn according to law, deposes and says:

1. I am a Federal Coal Mine Inspector, employed by the Mining Enforcement and Safety Administration, United States Department of the Interior. I have personal knowledge of the facts and circumstances stated herein.

2. On May 15, 1974, I attended a meeting at St. Clairsville, Ohio, between representatives of the United States Department of the Interior and an individual who had been employed by Central Division, Consolidation Coal Company, Franklin No. 25 mine, located in or near New Athens, Harrison County, Ohio.

3. Said individual stated in my presence that it is the practice at said mine to tamper with cassettes the operator must submit to Mining Enforcement and Safety Administration in connection with the respirable dust sampling program required by the Federal Coal Mine Health and Safety Act of 1969. Said individual stated that these practices include the removal and "voiding" of actual cassette samples and the substitution of fictitious samples. Said individual further stated a record of the cassette numbers of samples collected but voided was maintained on the bulletin board at the environmental office of said mine. He further stated that a brown book containing a listing of the voided and of fictitious samples was maintained and kept in a desk drawer in said office.

4. On May 16, 1974, acting upon the information contained in the preceding paragraph, I proceeded to the site of said mine and at approximately 7:00 a.m. I met Mr. Frank Kolat, federal coal mine inspector in the environmental office of the mine. A short time later Mr. Sam Kirkland, the environmental technician for the mine, entered this office. The environmental office of said mine is made available to federal mine inspectors for their use when they are present to conduct an inspection of the mine.

5. After I had talked with Mr. Kirkland for a short period he left the environmental office to go about his duties. In his absence I observed at least six separate sheets of paper on the bulletin board. Attached as Exhibit No. 1 is a Xerox copy of a list which had been supplied by the former employee of the said mine. The lists I observed on May 16 on the bulletin board in the environmental office of said mine were substantially identical in form and similar in content to Exhibit No. 1. These papers listed respirable dust cassettes apparently used in said mine by identification number, date, and weight of sample. These listed at least six cassette numbers as "void," namely, 15684738, 15743878, 15744164, 15744264, 15744170, and 15744071.

6. Before accompanying Mr. Kolat and me on the inspection of the mine, Mr. Kirkland returned to the environmental office. At that time I observed him remove from the desk in that office a hard bound book, approximately 3 inches by 6 inches in size, and stuff it in the front of his coveralls. He did not tell me what the book contained and I did not ask him. Mr. Kirkland then accompanied Mr. Kolat and me on the mine inspection.

7. At approximately 1:30 p.m. after completing the mine inspection, I left the mine premises.

THOMAS A. JESKEY (signed)

Sworn to and subscribed before me, a United States Magistrate, this 21st day of May, 1974.

JOSEPH FREEDMAN (signed)
U. S. Magistrate

HANNA COAL COMPANY - HIGH RISK DUST SAMPLES Exhibit A

MINE: Franklin #25 U.S.B.M. I.D. NO. _____

	SECTION-7 LEFT I.D. # C.L.			SECTION _____ I.D. # _____			SECTION _____ I.D. # _____			SECTION _____ I.D. # _____	
:e	Cassette	Wt.	Date	Cassette	Wt.	Date	Cassette	Wt.	Date	Cassette	
1	15546502	.1	4/2	15744293	VOID						
	15691178	1.0	4/3	15744087	VOID						
6	15554319	.1	4/								
7	15554472	3.4									
8	15691160	.5									
1	15690593	2.1									
2	15691112	1.1									
3	15531734	2.8									
4	15695010	.8									
14	15684133	.4									
2	15690903	1.0									
	34 CUT.	13.97									
11	15634995	.3									
12	15[illegible]517	4.5									
13	15694913	1.8									
15	15694964	VOID									
19	15694758	VOID									
17	15694707	VOID									
21	15534293	.1									
12	15298517	VOID									
22	15744085	.1									
19	15690993										
100	15743803	1.9									

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrate's Docket No. .....

Case No. .....

UNITED STATES OF AMERICA VS. The Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio	SEARCH WARRANT M2 74-102

[Filed: May 28, 1974]

To Any Special Deputy United States Marsal [sic]

Affidavit having been made before me by that he has reason to believe[1] that on the premises known as the Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples, which are used or intended to be used for the purpose of evading the respir-

1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

able coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitutes evidence of such violations: 30 U.S.C. 819(b), (c), (d); 30 USC 842; 30 C.F.R. Part 70 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 21st day of May, 1974.

JOSEPH FREEDMAN (signed)
U. S. Magistrate.

RETURN

I received the attached search warrant May 21, 1974, and have executed it as follows:

On May 22, 1974 at 9:00 o'clock A.M., I searched the premises described in the warrant and

I left a copy of the warrants with Leo Marks Chief Environmental Technician together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1. Records of respirable dust samples taken from walls

2. Sheet of yellow legal pad dated 04-03-74 with violations
3. Scratch paper with cassettes numbers and Bob Lasick's name
4. Five (5) scratch papers stapled together
5. Zerox copy of mine data card #15691143
6. White tablet papers with cassettes numbers and writing on it.
7. Xerox copy of inter-office communications from Leo Marks to all environmental technicians
8. Manila folder identified by surface 10 and 15's with records of respirable dust samples (Containing seven (7) pages)
9. Manila folder identified by Rose Valley #06 with records of respirable dust samples (Containing twelve (12) pages)
10. Manila folder identified by Friendship Park #15 with records of Respirable dust samples (Containing five (5) pages)
11. Yellow legal sheet paper with subject Main West 052 Violation 038
12. Manila folder identified by Franklin #25 with records of respirable dust samples (Containing seventeen (17) pages)
13. Manila folder identified by Oak Park #07 with records of respirable dust samples Containing nine (9) pages)

SEE FOLLOWING ATTACHMENT #1

This inventory was made in the presence of Dan Johnson, Leo Marks and Ronald Keaton.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

WILLIAM A. HOLGATE (signed)

Subscribed and sworn to and returned before me this 22nd day of May, 1974.

JOSEPH FREEDMAN (signed)
U. S. Magistrate.

M2 74-102

attachment #1 to search warrant issued 5/21/74

14. Manila folder identified by Mine Data Cards (Copy) #25
15. Fifty-six (56) Mine Data Cards secured by rubber bands
16. Cassette #15745372 with accompanying data card dated 5/21/74
17. Four (4) casettes each in separate mailing containers with matching data cards attached by rubber band. Mailers not sealed and check mark on outside of mailers.
18. Four (4) individual mailers each with one casette and matching data card inside. Mailers not sealed.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrate's Docket No. .....
Case No. .....

UNITED STATES OF AMERICA
vs.
The Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio

AFFIDAVIT FOR SEARCH WARRANT M2 74-102

[Filed: May 28, 1974]

BEFORE Joseph J. Freedman, First National Bank Building, Steubenville, Ohio

The undersigned being duly sworn deposes and says:

That he has reason to believe[1] that on the premises known as the Georgetown General Office of Consolidation Coal Company, a red brick building about three-fourths of a mile from Ohio State Route 250, at Georgetown, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain

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1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples, which are used or intended to be used for the purpose of evading the respirable coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations: 30 U.S.C. 819 (b), (c), (d); 30 U.S.C. 842; 30 C.F.R. Part 70.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE ATTACHED[1]

WILLIAM A. HOLGATE (signed)
Signature of Affiant.

Special Deputy U.S. Marshal
Official Title, if any.

Sworn to before me, and subscribed in my presence, May 21, 1974.

JOSEPH FREEDMAN (signed)
United States Magistrate.

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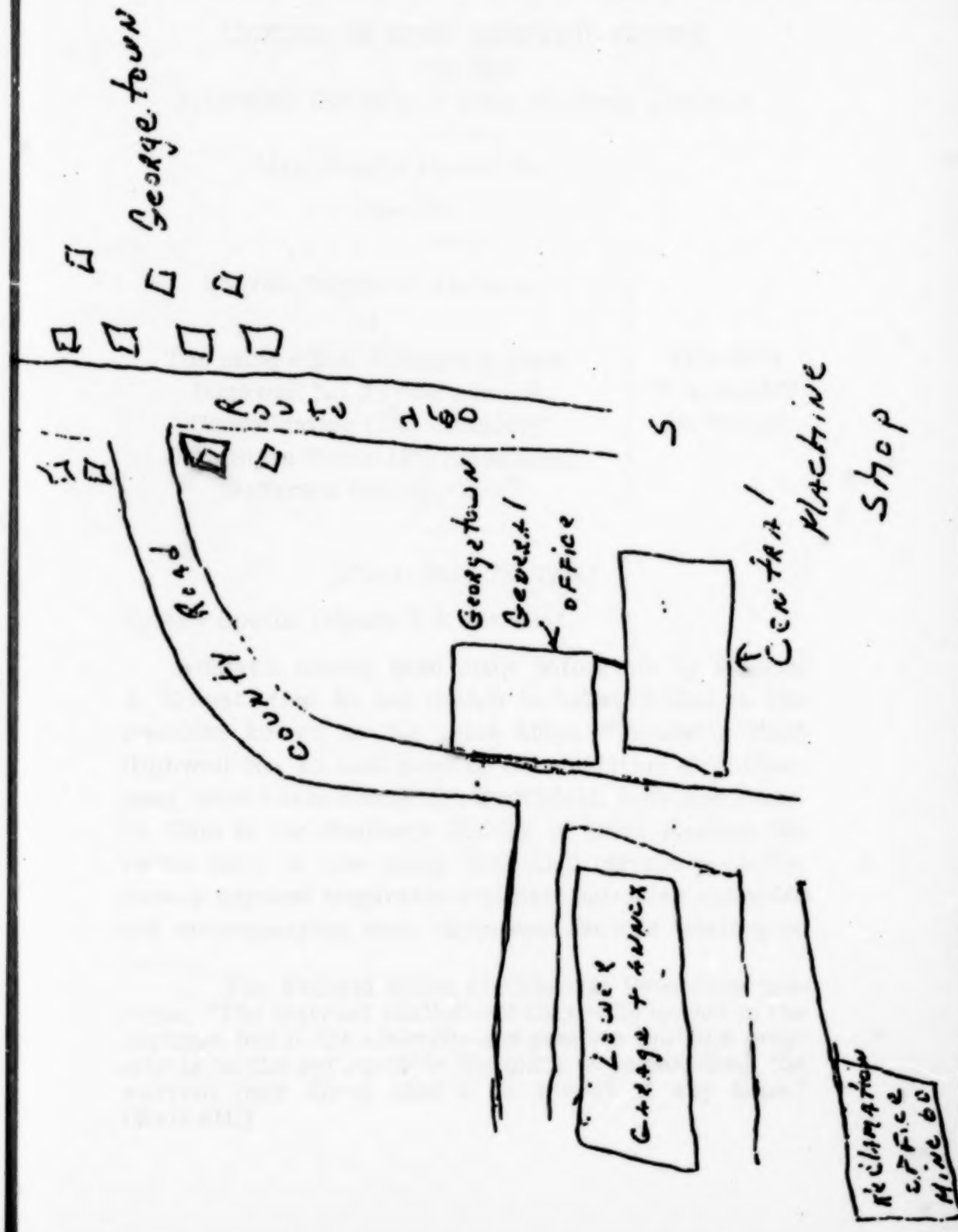
1. The Holgate affidavit which was attached here is identical to the Holgate affidavit reprinted at pages 53a-56a of this Appendix and to avoid duplication, is not reprinted herein.



UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrate's Docket No. .....

Case No. .....

UNITED STATES OF AMERICA vs. The mine office, Friendship Park Highwall No. 15 coal mine of Consolidation Coal Company Ohio State Route 151, Smithfield, Jefferson County, Ohio	SEARCH WARRANT M2 74-101

[Filed: May 28, 1974]

To Any Special Deputy U.S. Marshal

Affidavit having been made before me by William A. Holgate that he has reason to believe[1] that on the premises known as the mine office, Friendship Park Highwall No. 15 coal mine of Consolidation Coal Company, Ohio State Route 151, Smithfield, Jefferson County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to

1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

respirable coal dust samples, and a respirable dust pump the hose of which has been punctured, which are used or intended to be used for the purpose of evading the respirable coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations; 30 U.S.C. 819 (b), (c), (d); 30 U.S.C. 842; 30 C.F.R., Part 70 and as I am satisfied that here is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 21st day of May, 1974.

JOSEPH FREEDMAN (signed)
U.S. Magistrate.

RETURN

I received the attached search warrant May 21, 1974 and have executed it as follows:

On May 22, 1974 at 9:00 o'clock A.M., I searched the premises described in the warrant and I left a copy of the warrant with Robert Lasick, Environmental Technician together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Items

Personal daily sampling book	9:05 AM
Cassette No. 15517651 and Data Card	9:07 AM
Cassette No. 15517546 and Data Card	9:08 AM
Mine Data cards filled except for dates and the Cassettes Nos. 15517607, 15517395, 15517668 and 15517643	9:10 AM
2 Sets of personal files Metal	9:18 AM
second files has a mine I.D. on it	9:19 AM
1 Cassette No. 15517701	9:22 AM
1 Cassette No. 15517614	9:24 AM
1 Folder High Risk Sampling Records	9:55 AM
1 Folder Quit files	9:07 AM
1 Folder Cassette No's	10:09 AM
3 Sheets Dust Samples by Section	10:15 AM

This inventory was made in the presence of Robert Lasick Environmental Technician and Stanley Kretaski CMI Supervisor.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

FRANK J. (ILLEGIBLE) (signed)

Subscribed and sworn to and returned before me this 22nd day of May, 1974

JOSEPH FREEDMAN (signed)
U.S. Magistrate

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrate's Docket No. .....
Case No. .....

UNITED STATES OF AMERICA vs. The mine office, Friendship Park Highwall No. 15, coal mine of Consolidation Coal Company, Ohio State Route 151, Smithfield, Jefferson County, Ohio	AFFIDAVIT FOR SEARCH WARRANT M2 74-101

[Filed: May 28, 1974]

BEFORE Joseph J. Freedman, First National Bank Bldg., Steubenville, Ohio.

The undersigned being duly sworn deposes and says: That he has reason to believe[1] that on the premises known as the mine office, Friendship Park Highwall No. 15 coal mine of Consolidation Coal Company, Ohio State Route 151, Smithfield, Jefferson County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respir-

1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

able coal dust samples, and a respirable dust pump the hose of which has been punctured, which are used or intended to be used for the purpose of evading the respirable coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations; 30 U.S.C. 819 (b), (c), (d); 30 U.S.C. 842; 30 C.F.R. Part 70.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are ss follows:

SEE ATTACHED[1]

WILLIAM A. HOLGATE (signed)
Signature of Affiant.

Special Deputy U.S. Marshal
Official Title, if any.

Sworn to before me, and subscribed in my presence, May 21, 1974.

JOSEPH FREEDMAN (signed)
United States Magistrate.

1. The Holgate affidavit which was attached here is identical to the Holgate affidavit reprinted at pages 53a-56a of this Appendix and to avoid duplication, is not reprinted herein.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrates Docket No. .....
Case No. .....

UNITED STATES OF AMERICA vs. The mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio	SEARCH WARRANT M2 74-103

[Filed: May 28, 1974]

To Any Special Deputy United States Marshal

Affidavit having been made before me by William A. Holgate that he has reason to believe[1] that on the premises known as the mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples, which are used or intended to be used for the purpose of evading the respirable coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations: 30 U.S.C. 819(b), (c), (d); 30 U.S.C. 842; 30 C.F.R., Part 70 and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 21st day of May, 1977

JOSEPH FREEDMAN (signed)
U. S. Magistrate.

RETURN

I, John J. (illegible), received the attached search warrant May 21, 1974, and have executed it as follows:

On May 22, 1974 at 9:00 oclock AM, I searched the premises described in the warrant and I left a copy of the warrant with Richard Schrickel together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

1. Box of 25 cassettes and data cards, exposed, in manila envelopes. Label on box Order No. 06-65-22335. see attachment 2

2. 3 Cardex metal file card containers—820 HP alum card books.
3. 1 brown record book for 1973 and 1974
4. 1 sheet of Hanna Coal Company—high risk dust samples bolter 011 Hi-wall violation 4/9 to 4/11
5. Franklin Highwall folder with 6 sheets of paper containing samples for Notice of Non-Compliance. Dates, inclusively, 9-9-70 to 10-23-70.

see attachments 1, 2 and 3

This inventory was made in the presence of Richard Schrickel and Philip Gibson.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

JOHN J. (ILLEGIBLE) (signed)

Subscribed and sworn to and returned before me this 22nd day of May, 1974.

JOSEPH FREEDMAN (signed)
U. S. Magistrate

M2 74-103
33-01065
ATTACHMENT NO. 2

Respirable Dust Samples
Collected at the Franklin Highwall Mine

	Cassette No.	Date	Occ.	Miner
Data	15745390	4-15-74	046	Robert Taggart
Cards	15745701	4-15-74	046	James Scouler
Included	15745869	5-21-74	036	Guy Brown
	15744044	5-20-74	036	Guy Brown
	15745491	5-17-74	036	Ellis Balvin
	15745844	4-15-74	049	Frank Kovalski
	15745639	4-15-74	046	Gary Bess
	15745521	5-17-74	036	Ron (illegible)
	15745743	5-20-74	INTAKE AIR	(011-0)
	15745586	5-21-74	036	Joe Tennant
	15745396	4-15-74	046	Wilford Harris
	15745813	5-16-74	INTAKE AIR	(011-0)
	15745421	4-15-74	049	Ray (illegible)
	15745579	4-15-74	046	Gene (illegible)
	15743807	5-15-74	036	Ellis Balvin
	15745832	5-16-74	INTAKE AIR	(011-0)
	15745875	5-21-74	036	Bill Gasset
	15743872	5-20-74	036	Joe Tennant
	15745385	5-22-74	036	Bill Gasset
	15743850	5-16-74	036	Homer Balvin
	15745370	4-15-74	046	George (illegible)
	15744108	5-15-74	036	Ron (illegible)
	15745417	4-15-74	046	Harry Gordon
	15745425	4-15-74	049	Mario Banal, Jr.
	15744289	5-16-74	036	Ron (illegible)

This Information was recorded and documented in the Presence of Richard Schrickel, Safety Engineer.
Time of day 11:10 A.M.

JOHN J. (ILLEGIBLE) (signed)
PHILIP GIBSON (signed)
(signature deleted)

Attachment 1

Franklin Highwall No. 65 33-01065

6. Folder with Hanna Coal Company—High risk dust samples
M. East J.D. 001 dates 11-28-(73) to 5/21-(74).
1 sheet of information containing this data.
1 notice of compliance

7. Folder with Hanna Coal Company—high risk dust samples for 5 left ME I.D. 010
dates 8-20-(73) to 5/22-(74)
1 sheet of this information
1 cassette cycle record card—dates 8-20/73 to 4-10-(74)
1 notice of compliance

8. Folder with Hanna Coal Company—high risk samples for 5 right M.E. I.D. 011
dates 2-4-(73) to 5-21-(74)
1 sheet with this information on it.
1 sheet of notice of compliance
1 sheet of notice of compliance (intake air)

The above information was recorded and documented in the presence of Richard Schrickel, Safety Engineer on May 22, 1974 at 11:16 A.M.

The above is an inventory of property taken pursuant to the warrant.

JOHN J. (ILLEGIBLE) (signed)
(signature deleted)
PHILIP GIBSON (signed)

Attachment No. 3

Franklin Highwall No. 65 Mine 33-01065

Placement Sheet

Daily Record of Miners on Duty for the following days:

May 20, 1974 (7 pages)
Afternoon—2 pages
Day Shift—3 pages
Midnight—2 pages

May 21, 1974 (6 pages)
Midnight—2 pages
Day Shift—3 sheets
Afternoon—1 sheet

May 22, 1974 (5 pages)
Midnight—2 sheets
Day Shift—unknown day & midnight listed

The above information is an inventory of property taken pursuant to the warrant on May 22, 1974 at 12:15 P.M.

The inventory list was made or recorded in the presence of Richard Schrickel.

5-22-74
JOHN J. (ILLEGIBLE) (signed)
PHILIP GIBSON (signed)

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrate's Docket No. .....
Case No. .....

UNITED STATES OF AMERICA vs. The mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio	AFFIDAVIT FOR SEARCH WARRANT M2 74-103

[Filed: May 28, 1974]

BEFORE Joseph J. Freedman, First National Bank Building, Steubenville, Ohio

The undersigned being duly sworn deposes and says: That he has reason to believe[1] that on the premises known as The mine office, Franklin Highwall coal mine, of Consolidation Coal Company, Ohio State Route 519, New Athens, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples, which are used or intended to be used for the purpose of

1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

evading the respirable coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations: 30 U.S.C. 819(b), (c), (d); 30 U.S.C. 842; 30 C.F.R., Part 70.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE ATTACHED[1]

WILLIAM A. HOLGATE (signed)
Signature of Affiant.

Special Deputy U.S. Marshal
Official Title, if any.

Sworn to before me, and subscribed in my presence, May 21, 1974.

JOSEPH FREEDMAN (signed)
United States Magistrate.

1. The Holgate affidavit which was attached here is identical to the Holgate affidavit reprinted at pages 53a-56a of this Appendix and to avoid duplication, is not reprinted herein.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrate's Docket No. .....

Case No. .....

UNITED STATES OF AMERICA
vs.
The mine office, Rose Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale, Harrison County, Ohio

SEARCH WARRANT
M2 74-105

[Filed: May 28, 1974]

To Any Special Deputy United States Marshal

Affidavit having been made before me by William A. Holgate that he has reason to believe[1] that on the premises known as The mine office, Rose Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples, which are used or intended to be used for the

1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

purpose of evading the respirable coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations: 30 U.S.C. 819(b), (c), (d); 30 U.S.C. 842; 30 C.F.R. Part 70., and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 21st day of May, 1974.

JOSEPH FREEDMAN (signed)
U.S. Magistrate.

RETURN

I received the attached search warrant May 21, 1974, and have executed it as follows:

On May 22, 1974 at 9:00 o'clock A.M., I searched the premises described in the warrant and I left a copy of the warrant with William McCullough together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

One mine data card No. 15736254

One cassette No. 15736603 and mine data card

One cassette No. 15742162 and mine data card with wrong I.D. No. 15742165

One card of Respirable dust record Soc. Sec. No. 288-14-5622

One card of Respirable dust record Soc. Sec. No. 294-42-5084

One card of Respirable dust record Soc. Sec. No. 288-14-9372

One record book marked No. 1 book.
" " " " No. 2 book.
" " " " No. 3 book.
" " " " No. 4 book.
" " " " No. 5 book.
" " " " No. 6 book.
" " " " No. 7 book.
" " " " No. 8 book.
" " " " No. 9 book.
" " " " No. 10 book.
" " " " No. 11 book.
" " " " No. 12 book.
" " " " No. 13 book.

One environmental file cabinet complete update records.

This inventory was made in the presence of Gerald Young and Frances Dulkoski.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

NICKOLAS VUCELICH (signed)

Subscribed and sworn to and returned before me this 22 day of May, 1974.

JOSEPH FREEDMAN (signed)
U.S. Magistrate

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrate's Docket No. .....
Case No. .....

UNITED STATES OF AMERICA
vs.
The mine office, Rose Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale, Harrison County, Ohio

AFFIDAVIT FOR SEARCH WARRANT M2 74-105

[Filed: May 28, 1974]

BEFORE Joseph J. Freedman, First National Bank Building, Steubenville, Ohio.

The undersigned being duly sworn deposes and says:

That he has reason to believe[1] that on the premises known as The mine office, Rose Valley No. 6 coal mine of Consolidation Coal Company, Harrison County, Route 14, Hopedale, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal

1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

dust samples, which are used or intended to be used for the purpose of evading the respirable coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations: 30 U.S.C. 819(b), (c), (d); 30 U.S.C. 842; 30 C.F.R. Part 70.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE ATTACHED[1]

WILLIAM A. HOLGATE (signed)
Signature of Affiant.

Special Deputy U.S. Marshal
Official Title, if any.

Sworn to before me, and subscribed in my presence, May 21, 1974.

JOSEPH FREEDMAN (signed)
United States Magistrate

1. The Holgate affidavit which was attached here is identical to the Holgate affidavit reprinted at pages 53a-56a of this Appendix and to avoid duplication, is not reprinted herein.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION

Magistrate's Docket No. .....

Case No. .....

UNITED STATES OF AMERICA vs. The mine office, Oak Park No. 7 coal mine, of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio	SEARCH WARRANT M2 74-107

[Filed: May 28, 1974]

To ANY SPECIAL DEPUTY UNITED STATES MARSHAL

Affidavit having been made before me by William A. Holgate that he has reason to believe[1] that on the premises known as The mine office, Oak Park No. 7 coal mine, of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples which are used or to be used for the purpose of evading the respirable

1. The Federal Rules of Criminal Procedure provide: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations: 30 U.S.C. 819(b), (c), (d); 30 U.S.C. 842; 30 C.F.R. Part 70. and as I am satisfied that there is probable cause to believe that the property so described is being concealed on the premises above described and that the foregoing grounds for application for issuance of the search warrant exist.

You are hereby commanded to search forthwith the place named for the property specified, serving this warrant and making the search in the daytime and if the property be found there to seize it, leaving a copy of this warrant and a receipt for the property taken, and prepare a written inventory of the property seized and return this warrant and bring the property before me within ten days of this date, as required by law.

Dated this 21st day of May, 1974.

JOSEPH FREEDMAN (signed)
U. S. Magistrate.

RETURN

I received the attached search warrant May 21, 1974, and have executed it as follows:

On May 22, 1974 at 9 o'clock A.M., I searched the premises described in the warrant and I left a copy of the warrant with William Molnar, Superintendent together with a receipt for the items seized.

The following is an inventory of property taken pursuant to the warrant:

Mine data card 10154821
4 by 6 file card
Yellow legal sheet
Stenographic note book dated 2-11-74 for dust samples to 5-21-74
4 by 7 Brown Books, 9 of them, 015 High Risk Book, 001 High Risk, 002 High Risk Book, 017 High Risk Book, Book with Paul Kidneys name inside, High Risk Book all sections, 003 High Risk Book, 004 High Risk Book, and personal sampling book, Brown paper sack with cassettes and data cards for Georgetown. Yellow Canary legal pad, sections, names, dates, sampled and to be sampled. Mine data cards — 10154696 — 10154903 — 10155400. SEE ATTACHED COPY

This inventory was made in the presence of Richard Barr and Frank Vigoffi.

I swear that this Inventory is a true and detailed account of all the property taken by me on the warrant.

JACK A. COLOGIE (signed)

Subscribed and sworn to and returned before me this 22nd day of May, 1974.

JOSEPH FREEDMAN (signed)
U. S. Magistrate

M2 74-107

ATTACHED COPY

5-22-74

Jack A. Cologie

Respirable dust record card, A. E. (illegible) SSA No. 525-76-6695.

Manilla Folder, copies of Mine data card Nos. 15475525—15475478—15475580—10155359—15475502—15475522—15475599—15531386—15475518.

Manilla Folder, sections sampled.

File Cabinet, 10 sliding trays (Drawers) size about 11 inches wide, 25 inches long and 16 inches high; with mens SSA. Nos. 175-44-5477 to 525-76-6695 (in drawer), Sections 015 to 030 Blank drawer, Salary Peoples S.S.A. Nos. from 192-28-2925 to 525-88-044.

Canary legal pad for June sampling.

Cassettes and data cards from sampling head on rack, Nos. 15743417—15743728—15743407—15743721—15685807—15743414—15743342 and 15685833.

JACK A. COLOGIE (signed)

In the presence of Richard Barr, and Frank Vigoffi.

UNITED STATES DISTRICT COURT
FOR THE
SOUTHERN DISTRICT OF OHIO, EASTERN DIVISION
Magistrate's Docket No.....
Case No. .....

UNITED STATES OF AMERICA
vs.
The mine office, Oak Park No. 7 coal mine, of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio

AFFIDAVIT FOR SEARCH WARRANT M2 74-107

[Filed: May 28, 1974]

BEFORE Joseph J. Freedman, First National Bank Building, Steubenville, Ohio.

The undersigned being duly sworn deposes and says:

That he has reason to believe[1] that on the premises known as The mine office, Oak Park No. 7 coal mine, of Consolidation Coal Company, Ohio State Route 9, Cadiz, Harrison County, Ohio in the Southern District of Ohio, Eastern Division there is now being concealed certain property, namely exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples which are used or to be used for the purpose of evading the

1. The Federal Rules of Criminal Procedure provides: "The warrant shall direct that it be served in the daytime, but if the affidavits are positive that the property is on the person or in the place to be searched, the warrant may direct that it be served at any time." (Rule 41C)

respirable coal dust sampling requirements of the Federal Coal Mine Health and Safety Act or constitute evidence of such violations: 30 U.S.C 819(b), (c), (d); 30 U.S.C. 842; 30 C.F.R. Part 70.

And that the facts tending to establish the foregoing grounds for issuance of a Search Warrant are as follows:

SEE ATTACHED[1]

WILLIAM A. HOLGATE (signed)
Signature of Affiant.

Special Deputy U.S. Marshal
Official Title, if any.

Sworn to before me, and subscribed in my presence, May 21, 1974.

JOSEPH FREEDMAN (signed)
United States Magistrate

1. The Holgate affidavit which was attached here is identical to the Holgate affidavit reprinted at pages 53a-56a of this Appendix and to avoid duplication, is not reprinted herein.

APPENDIX G

Section 103 (30 U.S.C. §813) of the Federal Coal Mine Health and Safety Act of 1969.

INSPECTIONS AND INVESTIGATIONS—PURPOSES

(a) Authorized representatives of the Secretary shall make frequent inspections and investigations in coal mines each year for the purpose of (1) obtaining, utilizing, and disseminating information relating to health and safety conditions, the causes of accidents and the causes of diseases and physical impairments originating in such mines, (2) gathering information with respect to mandatory health or safety standards, (3) determining whether an imminent danger exists, and (4) determining whether or not there is compliance with the mandatory health or safety standards or with any notice, order, or decision issued under this subchapter. In carrying out the requirements of clauses (3) and (4) of this subsection, no advance notice of an inspection shall be provided to any person. In carrying out the requirements of clauses (3) and (4) of this subsection in each underground coal mine, such representatives shall make inspections of the entire mine at least four times a year.

Right of entry of investigators

(b) (1) For the purpose of making any inspection or investigation under this chapter, the Secretary or any authorized representative of the Secretary shall have a right of entry to, upon, or through any coal mine.

(2) For the purpose of developing improved mandatory health standards, the Secretary of Health, Education, and Welfare or his authorized representative

shall have a right of entry to, upon, or through, any coal mine.

(3) The provisions of this chapter relating to investigations and records shall be available to the Secretary of Health, Education, and Welfare to enable him to carry out his functions and responsibilities under this chapter.

Utilization of facilities and personnel of other Federal agencies

(c) For the purpose of carrying out his responsibilities under this chapter, including the enforcement thereof, the Secretary may by agreement utilize with or without reimbursement the services, personnel, and facilities of any Federal agency.

Hearings; subpena; fees; contempt

(d) For the purpose of making any investigation of any accident or other occurrence relating to health or safety in a coal mine, the Secretary may, after notice, hold public hearings, and may sign and issue subpenas for the attendance and testimony of witnesses and the production of relevant papers, books, and documents, and administer oaths. Witnesses summoned shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of contumacy or refusal to obey a subpena served upon any person under this section, the district court of the United States for any district in which such person is found or resides or transacts business, upon application by the United States and after notice to such person, shall have jurisdiction to issue an order requiring such person to appear and give testimony before the Secretary or to appear

and produce documents before the Secretary, or both, and any failure to obey such order of the court may be punished by such court as a contempt thereof.

Notice of accident; preservation of evidence; supervision of rescue operations

(e) In the event of any accident occurring in a coal mine, the operator shall notify the Secretary thereof and shall take appropriate measures to prevent the destruction of any evidence which would assist in investigating the cause or causes thereof. In the event of any accident occurring in a coal mine where rescue and recovery work is necessary, the Secretary or an authorized representative of the Secretary shall take whatever action he deems appropriate to protect the life of any person, and he may, if he deems it appropriate, supervise and direct the rescue and recovery activity in such mine.

Orders to insure protection of persons and property

(f) In the event of any accident occurring in a coal mine, an authorized representative of the Secretary, when present, may issue such orders as he deems appropriate to insure the safety of any person in the coal mine, and the operator of such mine shall obtain the approval of such representative, in consultation with appropriate State representatives, when feasible, of any plan to recover any person in the mine or to recover the mine or to return affected areas of the mine to normal.

Imminent danger notice; requisites; special inspection

(g) Whenever a representative of the miners has reasonable grounds to believe that a violation of a

mandatory health or safety standard exists, or an imminent danger exists, such representative shall have a right to obtain an immediate inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, signed by the representative of the miners, and a copy shall be provided the operator or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual miners referred to therein shall not appear in such copy. Upon receipt of such notification, a special inspection shall be made as soon as possible to determine if such violation or danger exists in accordance with the provisions of this subchapter.

Accompaniment right of representative of miners

(h) At the commencement of any inspection of a coal mine by an authorized representative of the Secretary, the authorized representative of the miners at the mine at the time of such inspection shall be given an opportunity to accompany the authorized representative of the Secretary on such inspection.

Hazardous conditions; spot inspections

(i) Whenever the Secretary finds that a mine liberates excessive quantities of methane or other explosive gases during its operations, or that a methane or other gas ignition or explosion has occurred in such mine which resulted in death or serious injury at any time during the previous five years, or that there exists in such mine other especially hazardous conditions, he shall provide a minimum of one spot inspection by his authorized representative of all or part of such mine

during every five working days at irregular intervals. Pub.L. 91—173, Title I, § 103, Dec. 30, 1969, 83 Stat. 749.

Section 108 (30 U.S.C. §818) of the Federal Coal Mine Health and Safety Act of 1969.

CIVIL ACTION FOR RELIEF; JURISDICTION AND VENUE; GROUNDS FOR INVOCATION OF REMEDIES; FORCE AND EFFECT OF ORDERS; REPRESENTATION OF SECRETARY

The Secretary may institute a civil action for relief, including a permanent or temporary injunction, restraining order, or any other appropriate order in the district court of the United States for the district in which a coal mine is located or in which the operator of such mine has his principal office, whenever such operator or his agent (a) violates or fails or refuses to comply with any order or decision issued under this chapter, or (b) interferes with, hinders, or delays the Secretary or his authorized representative, or the Secretary of Health, Education, and Welfare or his authorized representative, in carrying out the provisions of this chapter, or (c) refuses to admit such representatives to the mine, or (d) refuses to permit the inspection of the mine, or the investigation of an accident or occupational disease occurring in, or connected with, such mine, or (e) refuses to furnish any information or report requested by the Secretary or the Secretary of Health, Education, and Welfare in furtherance of the provisions of this chapter, or (f) refuses to permit access to, and copying of, such records as the Secretary or the Secretary of Health, Education, and Welfare determines necessary in carrying out the provisions of this chapter. Each court shall have jurisdiction to provide such relief as may be appropriate. Temporary restraining orders

shall be issued in accordance with Rule 65 of the Federal Rules of Civil Procedure, as amended, except that the time limit in such orders, when issued without notice, shall be seven days from the date of entry. Except as otherwise provided herein, any relief granted by the court to enforce an order under clause (a) of this section shall continue in effect until the completion or final termination of all proceedings for review of such order under this subchapter, unless, prior thereto, the district court granting such relief sets it aside or modifies it. In actions under this section, subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him. In any action instituted under this section to enforce an order or decision issued by the Secretary after a public hearing in accordance with section 554 of Title 5, the findings of the Secretary, if supported by substantial evidence on the record considered as a whole, shall be conclusive. Pub.L. 91—173, Title I, § 108, Dec. 30, 1969, 83 Stat. 756.

Section 109 (30 U.S.C. §819) of the Federal Coal Mine Health and Safety Act of 1969.

PENALTIES—CIVIL PENALTIES FOR VIOLATIONS OF MANDATORY HEALTH AND SAFETY STANDARDS; HEARINGS; FACTORS DETERMINING ASSESSMENT; FINDINGS; APPLICABILITY OF SECTION 554 OF TITLE 5; PROCEDURES FOR ENFORCEMENT

(a) (1) The operator of a coal mine in which a violation occurs of a mandatory health or safety standard or who violates any other provision of this chapter, except the provisions of subchapter IV of this chapter, shall be assessed a civil penalty by the Secretary under paragraph (3) of this subsection which penalty shall not be more than $10,000 for each such violation. Each occurrence of a violation of a mandatory health and safety standard may constitute a separate offense. In determining the amount of the penalty, the Secretary shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the operator charged in attempting to achieve rapid compliance after notification of a violation.

(2) Any miner who willfully violates the mandatory safety standards relating to smoking or the carrying of smoking materials, matches, or lighters shall be subject to a civil penalty assessed by the Secretary under paragraph (3) of this subsection, which penalty shall not be more than $250 for each occurrence of such violation.

(3) A civil penalty shall be assessed by the Secretary only after the person charged with a violation under this chapter has been given an opportunity for a public hearing and the Secretary has determined, by decision incorporating his findings of fact therein, that a violation did occur, and the amount of the penalty which is warranted, and incorporating, when appropriate, an order therein requiring that the penalty be paid. Where appropriate, the Secretary shall consolidate such hearings with other proceedings under section 815 of this title. Any hearing under this section shall be of record and shall be subject to section 554 of Title 5.

(4) If the person against whom a civil penalty is assessed fails to pay the penalty within the time prescribed in such order, the Secretary shall file a petition for enforcement of such order in any appropriate district court of the United States. The petition shall designate the person against whom the order is sought to be enforced as the respondent. A copy of the petition shall forthwith be sent by registered or certified mail to the respondent and to the representative of the miners in the affected mine or the operator, as the case may be, and thereupon the Secretary shall certify and file in such court the record upon which such order sought to be enforced was issued. The court shall have jurisdiction to enter a judgment enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order and decision of the Secretary or it may remand the proceedings to the Secretary for such further action as it may direct. The court shall consider and determine de novo all relevant issues, except issues of fact which were or could have been litigated in review proceedings before a court of appeals

under section 816 of this title, and upon the request of the respondent, such issues of fact which are in dispute shall be submitted to a jury. On the basis of the jury's findings, the court shall determine the amount of the penalty to be imposed. Subject to the direction and control of the Attorney General, as provided in section 507(b) of Title 28, attorneys appointed by the Secretary may appear for and represent him in any action to enforce an order assessing civil penalties under this paragraph.

Willful violations or refusal to comply with health and safety standards by operators of mines

(b) Any operator who willfully violates a mandatory health or safety standard, or knowingly violates or fails or refuses to comply with any order issued under section 814 of this title, or any order incorporated in a final decision issued under this subchapter, except an order incorporated in a decision under subsection (a) of this section or section 820(b) (2) of this title, shall, upon conviction, be punished by a fine of not more than $25,000, or by imprisonment for not more than one year, or by both, except that if the conviction is for a violation committed after the first conviction of such operator under this chapter, punishment shall be by a fine of not more than $50,000, or by imprisonment for not more than five years, or by both.

Willful violations or refusal to comply with health and safety standards by corporate operators of mines

(c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under

this chapter or any order incorporated in a final decision issued under this chapter, except an order incorporated in a decision issued under subsection (a) of this section or section 820(b) (2) of this title, and any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (b) of this section.

False statements or representations

(d) Whoever knowingly makes any false statement, representation, or certification in any application, record, report, plan, or other document filed or required to be maintained pursuant to this chapter or any order or decision issued under this chapter shall, upon conviction, be punished by a fine of not more than $10,000, or by imprisonment for not more than six months, or by both.

Distribution or sale of noncomplying components

(e) Whoever knowingly distributes, sells, offers for sale, introduces, or delivers in commerce any equipment for use in a coal mine, including, but not limited to, components and accessories of such equipment, which is represented as complying with the provisions of this chapter, or with any specification or regulation of the Secretary applicable to such equipment, and which does not so comply, shall, upon conviction, be subject to the same fine and imprisonment that may be imposed upon a person under subsection (d) of this section.

Pub.L. 91—173, Title I, § 109, Dec. 30, 1969, 83 Stat. 756.

Nos. 77-557, 77-606 and 77-622

In the Supreme Court of the United States

OCTOBER TERM, 1977

CONSOLIDATION COAL COMPANY, PETITIONER
v.
UNITED STATES OF AMERICA

FRANCIS LEO MARKS, PETITIONER
v.
UNITED STATES OF AMERICA

RAYMOND J. ZITKO, PETITIONER
v.
UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

WADE H. MCCREE, JR.,
Solicitor General,

BENJAMIN R. CIVILETTI,
Assistant Attorney General,

JEROME M. FEIT,
ROBERT J. ERICKSON,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-557

CONSOLIDATION COAL COMPANY, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-606

FRANCIS LEO MARKS, PETITIONER

v.

UNITED STATES OF AMERICA

No. 77-622

RAYMOND J. ZITKO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A)[1] is reported at 560 F. 2d 214. The opinions of the district court (Pet. Apps. D, E) are unreported.

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[1]Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 77-557.

JURISDICTION

The judgment of the court of appeals was entered on July 21, 1977. Petitions for rehearing were denied on August 29, 1977, in Nos. 77-606 and 77-622, and on September 16, 1977, in No. 77-577. Mr. Justice Stewart extended the time for filing a petition for a writ of certiorari in Nos. 77-606 and 77-622 to and including October 28, 1977. The petition for a writ of certiorari was filed on October 14, 1977, in No. 77-557, on October 26, 1977, in No. 77-606, and on October 28, 1977, in No. 77-622. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the warrants authorizing the search of various business premises owned by petitioner Consolidation Coal Company were supported by probable cause.

2. Whether petitioners Zitko and Marks have standing to challenge the search of company offices other than their own.

STATEMENT

1. On May 21, 1974, a United States Magistrate issued several warrants authorizing federal officers to search the general office and five field offices of the Consolidation Coal Company (the "Company") in Georgetown, Ohio, for evidence of violations of the Federal Coal Mine Health and Safety Act of 1969, 83 Stat. 742, 30 U.S.C. 801 *et seq.*[2] Based on lengthy affidavits of two officials of the

[2]Warrants were also issued to search three additional mining offices operated by the Company, but no evidence was seized at one site and material seized at the other two sites was voluntarily returned to the Company by the government.

Department of the Interior, William Holgate and Thomas Jeskey, the magistrate found probable cause to believe that the premises sought to be searched contained "exposed respirable coal dust sampling cassettes and accompanying data cards and records relating to respirable coal dust samples" (Pet. App. 45a) that had been used for the purpose of circumventing federal laws for monitoring atmospheric conditions in mines that cause "black lung" disease. See 30 U.S.C. 819(b), (c) and (d); 30 U.S.C. 842; 30 C.F.R., Part 70 (1974).

The next day, searches were conducted pursuant to the warrants at the designated offices, and a number of incriminating cassettes and records were seized (Pet. App. 46a-51a, 64a-66a, 72a-73a, 77a-81a, 86a-87a, 91a-93a). In August 1975, a multi-count indictment was returned by a grand jury of the United States District Court for the Southern District of Ohio charging petitioners with conspiracy, in violation of 18 U.S.C. 371, knowingly submitting false statements to the Department of the Interior, in violation of 30 U.S.C. 819(d), and willfully violating mandatory coal mine health and safety standards, in violation of 30 U.S.C. 819(b) and (c).

On June 11, 1976, without first holding an evidentiary hearing, the district court granted petitioner Consolidation Coal Company's motion to suppress all evidence seized in the six searches on the ground that the warrants were not supported by probable cause (Pet. App. D). In a separate order dated October 4, 1976, the district court held that petitioners Marks and Zitko, as corporate employees with supervisory responsibilities over the personnel and records at the offices searched, had standing to contest the six searches and therefore also suppressed the evidence as to them (Pet. App. F, No. 77-606). The government appealed, and the court of appeals reversed the suppression orders and remanded the case for further proceedings (Pet. App. A).

2. The search warrant affidavits submitted by William Holgate and Thomas Jeskey (Pet. App. 53a-56a, 58a-60a) stated that on May 15, 1974, they met with an unnamed former company employee who had worked at the Company's Franklin No. 25 and Franklin Highwall mines. According to the former employee, who spoke from personal knowledge, he had been instructed by his supervisors to maintain a supply of extra cassettes that contained respirable dust samples collected under controlled conditions. The former employee was directed to send all dust cassettes collected under actual mining conditions to technicians at the Company's laboratory, where the cassette could be opened and its contents analyzed. If a legitimate sample was found to offend the mandatory federal health standard, an artificially "clean" (low) sample, prepared by company technicians under controlled conditions, would be substituted and the authenticating documentation altered to conform (*id.* at 2a). The former employee said that he had been told by certain laboratory technicians, whom he identified by name, that similar practices were followed at other company mines located within the central region of Ohio.

Moreover, the former employee informed the federal inspectors that a list of all cassette samples actually collected as well as those subsequently voided was kept on a bulletin board at the environment office at the Franklin No. 25 mine, and he gave Inspector Jeskey a xerox copy of a list taken from the mine office showing that certain cassettes for collecting "high risk dust samples" (*id.* at 61a) had been voided. The former employee also said that a brown master book containing a listing of all voided and fictitious samples was kept in a desk drawer at the mine office, along with a number of cassettes containing control samples.

Finally, Inspector Jeskey's affidavit related that on May 16, 1974, the day after speaking with the former employee, he went to the Franklin No. 25 mine's environmental office, which was made available for use by federal mining inspectors. While there, Inspector Jeskey observed on the bulletin board a six-page list of respirable dust samples, including a record of at least six voided cassettes, which was similar to the xerox copy that he had previously received from the former employee. A short time later, Inspector Jeskey saw a company technician take a hard bound book from the desk drawer in the environmental office and place it in a pocket of the coveralls he was wearing, but the inspector was unable to ascertain what the book contained (Pet. App. 60).

ARGUMENT

1. These petitions challenge the court of appeals' reversal of the district court's suppression of evidence on grounds that the search warrants authorizing seizure of the evidence were not supported by probable cause. The decision of the court below places petitioners in the same position as if the district court had denied their motions to suppress. That ruling could not have been challenged by a pre-trial appeal (see *Cogen* v. *United States*, 278 U.S. 221), and the reasons of policy that counsel against permitting interlocutory appeals of denials of suppression motions similarly weigh against action by this Court to undertake interlocutory review of the suppression issue at this stage of the proceedings. See *Brotherhood of Locomotive Fireman & Enginemen* v. *Bangor & Aroostook Railroad Co.*, 389 U.S. 327. At trial petitioners may be acquitted, in which event their claims will be moot. If, on the other hand, any petitioners are convicted and their convictions are affirmed, they will then be able to present all of their contentions to this Court by seeking review of the final judgment.

2. Petitioners contend (Pet. 19-20; Pet. No. 77-606, p. 14; Pet. No. 77-622, pp. 18-19) that the search warrants were not supported by probable cause because there was no showing that the former employee of the Company was credible or that his information was reliable, as required by this Court's decisions in *Aguilar* v. *Texas*, 378 U.S. 108, and *Spinelli* v. *United States*, 393 U.S. 410. We note at the outset that the *Aguilar-Spinelli* requirements were addressed to the particular problem of warrants issued on the basis of information provided by professional informants, and several courts have suggested that they should not be applied in "wooden fashion" (*United States* v. *Burke*, 517 F. 2d 377, 380 (C.A. 2) (Friendly, J.)) to other contexts where relevant information of criminal activity has been provided out of a sense of civic duty by an eyewitness to or a victim of the crime. See, *e.g.*, *United States* v. *Swihart*, 554 F. 2d 264, 268-269 (C.A. 6); *United States* v. *Rollins*, 522 F. 2d 160, 164 (C.A. 2), certiorari denied, 424 U.S. 918; *United States* v. *Darensbourg*, 520 F. 2d 985, 988-989 (C.A. 5); *Rutherford* v. *Cupp*, 508 F. 2d 122, 123 (C.A. 9), certiorari denied, 421 U.S. 933. Here, the information was given to the agents by a person who had witnessed the commission of illegal activities in his capacity as a corporate employee. Petitioners do not suggest that he was a paid informant, that he had a motive to falsify, or that he was involved in any way in the ongoing criminal enterprise. In such circumstances, all that the Fourth Amendment requires is that the magistrate have "a substantial basis for crediting the" informant. *United States* v. *Harris*, 403 U.S. 573, 581.

In any event, when the affidavits are read in a commonsense manner (*United States* v. *Ventresca*, 380 U.S. 102, 108) and "the usual inferences which reasonable men draw from evidence" are made (*Johnson* v. *United States*, 333 U.S. 10, 14), it is readily apparent that the *Aguilar-Spinelli* test was satisfied in this case.[3] As detailed above, the government's probable cause showing was based both upon the information supplied by a former company employee and upon the corroborative observations of a federal investigator.[4] The affidavits plainly afforded a sufficient basis to conclude that the former employee's information was reliable, since they stated that he had gained much of his information by first-hand observation, while other facts that he passed along to the agents could only have been obtained by personal knowledge. See *United States* v. *Jenkins*, 525 F. 2d 819, 823 (C.A. 6); *United States* v. *Jensen*, 432 F. 2d 861, 863 (C.A. 6). Thus, according to the affidavits, the employee was previously employed at the Franklin No. 25 mine, he had participated in the dust sampling program at the mine, and he had been told by his superiors to maintain a supply of extra dust cassettes collected under controlled conditions and to forward all cassette samples to the Company's Georgetown laboratory (Pet. App. 54a). The employee also had been informed by two named technicians at the laboratory that it was a company practice to submit fictitious dust samples to federal

[3]Of course, reviewing courts must also pay deference to a magistrate's determination of probable cause when, as here, there is a substantial basis for that finding. See, *e.g.*, *United States* v. *Watson*, 423 U.S. 411, 423; *Spinelli* v. *United States*, *supra*, 393 U.S. at 419; *Jones* v. *United States*, 362 U.S. 257, 270-271. In addition, as we argued in our petition for a writ of certiorari in *United States* v. *Karathanos*, certiorari denied, 428 U.S. 910, it is doubtful that the Fourth Amendment exclusionary rule is applied wisely to suppress evidence obtained by the good-faith execution of a warrant issued by a federal magistrate.

[4]Although the Jeskey affidavit was submitted specifically to support only the warrant for the search of the Franklin No. 25 mine, the magistrate properly considered it, along with the Holgate

inspectors in all the company's mines in the central Ohio district (*id.* at 54a-55a).[5]

Moreover, the reliability of the former employee's information was supported by its very detail. The employee described the records and their locations in the Franklin No. 25 mine office with specificity and also furnished a xerox copy of some of the records, including a list describing certain respirable cassette dust samples as "void." This information was substantially corroborated the next day when Agent Jeskey went to the mine office and observed many of the records that the informant had previously described. *Draper* v. *United States*, 358 U.S. 307, 313. Copies of some of the documents were attached as an exhibit to the affidavit. See *Andresen* v. *Maryland*, 427 U.S. 463, 478 n. 9. In sum, the affidavits here "contain[ed] a sufficient statement of the underlying circumstances" to establish probable cause to believe that the Company was violating the respirable dust standards of the Federal Coal Mine Health and Safety Act and that the information was based "on something more substantial than a casual rumor circulating in the underworld or

affidavit, in determining whether there was probable cause to search the Georgetown district office and the other field offices and in determining whether the informant and his information were reliable. The affidavits were submitted to the magistrate at the same time and related closely to the same investigation. In such circumstances, "[i]t would be hypertechnical for the [magistrate] not to act upon an entire picture disclosed to him in interrelated affidavits presented to him on the same day." *United States* v. *Serao*, 367 F. 2d 347, 350 (C.A. 2), vacated on other grounds, 390 U.S. 202. See also *United States* v. *Dudek*, 560 F. 2d 1288, 1292-1293 (C.A. 6), certiorari denied, No. 77-5626, January 16, 1978; *United States* v. *Manufacturer's National Bank of Detroit*, 536 F. 2d 699, 702 (C.A. 6), certiorari denied *sub nom. Wingate* v. *United States*, 429 U.S. 1039.

[5]These statements may have been against the technicians' penal interests. See *United States* v. *Harris, supra*, 403 U.S. at 580, 583-584.

an accusation based merely on * * * general reputation." *Spinelli* v. *United States, supra*, 393 U.S. at 416.[6]

3. Petitioners argue (Pet. 6-19; Pet. No. 77-606, p. 14; Pet. No. 77-622, pp. 14-21) that the court of appeals erred in holding that, in light of the "regulatory character" of the searches in this case, issuance of the search warrants could be sustained "upon a lesser showing of probable cause comparable to that required to obtain a warrant to perform a periodic, administrative inspection of a commercial establishment. *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967)" (Pet. App. 7a-8a). As we have demonstrated above, however, the warrants were supported by the traditional standard of probable cause applicable to criminal investigative searches. It is therefore unnecessary for this Court to reach the question whether the court below erred in upholding the search

[6]Petitioners contend (Pet. 19-20) that the affidavits were deficient because, apart from the representations attributed to the laboratory technicians, they contained only "neutral" information. It is unclear why petitioners believe that the magistrate was obliged to disregard the technicians' information, since it is obvious from the affidavits that the former employee learned it from personal discussions, and the technicians would not likely have fabricated a story contrary to their own penal interests. In any event, the other facts supplied to the agents were hardly "neutral." The former employee's supervisor had told him to maintain a supply of fictitious dust sample cassettes and to send all samples collected to the Georgetown laboratory. Moreover, the informant saw (and xeroxed) a company record showing that several sampling cassettes had been "voided," and Agent Jeskey himself corroborated these details. In light of the legal requirement that a mine operator must "promptly collect and transmit" *all* dust samples to the Department of the Interior (see 30 C.F.R. 70.260(a) (1974); 30 U.S.C. 814(i)), this information alone was sufficient to give the agents probable cause to believe that the monitoring provisions of the Act were being violated.

warrants under a somewhat different standard of probable cause.[7]

In any event, regardless of the correctness of the court of appeals' conclusion that the searches of the Company's property may be sustained by the administrative search rationale of *See* and *Camara* v. *Municipal Court,* 387 U.S. 523,[8] this case is plainly governed by *United States* v. *Biswell,* 406 U.S. 314, and *Colonnade Catering Corp.* v. *United States,* 397 U.S. 72, and, hence, the searches could properly have been undertaken without a warrant.

Colonnade Catering involved the statutory authorization for warrantless inspections of federally licensed dealers in alcoholic beverages. Federal inspectors, without a warrant or the owner's permission, had forcibly entered a locked storeroom and seized illegal liquor. After

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[7]Thus we agree with the concurring opinion of Judge Engel, who concluded that, because the government agents' affidavits met "the more stringent standards of *Aguilar* and *Spinelli,*" there was no occasion to consider the administrative search question in this case (Pet. App. 18a).

[8]Unlike a search conducted pursuant to a criminal investigation, the administrative searches at issue in *Camara* and *See* were "aimed at securing city-wide compliance with minimum physical standards for private property" (*Camara* v. *Municipal Court, supra,* 387 U.S. at 535). Hence, "the mission of the inspection system was to discover and correct violations of the building code, conditions that were relatively difficult to conceal or correct in a short time" (*United States* v. *Biswell,* 406 U.S. 314, 316) and that "may not be apparent to the inexpert occupant himself" (*Camara* v. *Municipal Court, supra,* 387 U.S. at 537); the searches were "neither personal in nature nor aimed at the discovery of evidence of crime" (*ibid.*). Here, by contrast, the inspection was aimed at uncovering evidence of criminal conduct in the Company's administration of the required federal regulatory scheme to monitor the causes of "black lung" disease and at seizing documents and other materials demonstrating corporate non-compliance with the Act, rather than merely searching for physical safety or health hazards.

reviewing the history of federal involvement in the regulation of alcoholic beverages, the Court concluded that Congress had long exercised control over the liquor industry and had "broad power to design such powers of inspection under the liquor laws as it deems necessary to meet the evils at hand" (397 U.S. at 76). Although the Court invalidated the search in that case, it was because Congress had not specifically authorized warrantless entries in the applicable regulatory statute and had instead provided an alternative remedy, not because the Fourth Amendment would have barred such inspections if legislatively authorized. *Id.* at 77.

Similarly, in *Biswell,* the Court was faced with the warrantless search of a locked commercial storeroom during business hours as part of a federal gun control program authorized by 18 U.S.C. 923(g), which resulted in the seizure of unlicensed firearms from a federally licensed gun dealer. While federal regulation of firearms was not as deeply rooted in history as was governmental control of liquor, the Court sustained the warrantless inspection program challenged in that case because of the program's importance in the prevention of violent crime, the fact that a warrant requirement would have impeded enforcement in light of the ease with which statutory violations could be concealed, and the limited nature of the inspection's interference with the gun dealer's right to privacy. 406 U.S. at 315-316.[9]

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[9]As the Court observed (406 U.S. at 316):

> It is also plain that inspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.

Here, as in *Biswell,* "[l]arge interests are at stake" (406 U.S. at 315), and Congress has responded to the dangers involved in coal mining—"the most hazardous occupation in the United States" (H. R. Rep. No. 91-563, 91st Cong., 1st Sess. 1 (1969)) and an "industry [with] a history of close federal regulation" (Pet. App. 13a)[10]—by requiring "frequent inspections and investigations in coal mines each year for * * * enforcement purposes" (H.R. Rep. No. 91-563, *supra,* at 7). To combat the frequent occurrence of lung disease associated with unhealthful mining practices, Congress enacted strict measures for monitoring the air in coal mines (30 U.S.C. 842) and explicitly gave federal authorities the right to enter any "coal mine" to conduct inspections and investigations to ensure compliance with the federal regulations (30 U.S.C. 813(a) and (b)). To guarantee that the Act's broad remedial purposes would be effectuated, Congress expansively defined a "coal mine" to include all surface structures and facilities used in or resulting from the work of extracting coal (30 U.S.C. 802(h)).

Thus, Congress has adopted "a regulatory inspection system of business premises that is carefully limited in time, place, and scope" (406 U.S. at 315). The searches here were conducted by federal mine inspectors pursuant to this important regulatory scheme during regular business hours at surface structures intimately tied to the work of extracting coal and where records relating to the federal respirable coal dust sampling program could be found. In sum, even though the searches were authorized by warrants issued upon probable cause, they were independently sanctioned by a valid inspection statute

[10]See *Youghiogheny and Ohio Coal Co.* v. *Morton,* 364 F. Supp. 45, 49-50, 52 (S.D. Ohio) (three-judge court).

enacted by Congress and could have been carried out even in the absence of probable cause or a warrant.[11]

4. Petitioner Marks asserts (Pet. No. 77-606, pp. 15-20) that he has standing to contest each of the six searches.[12] This issue was not decided by the court of appeals (Pet. App. 5a n. 7) and need not be considered by this Court, since, as we have shown above, the searches of the Company's property did not violate the Fourth Amendment. Petitioner's claim is, in any event, without merit.

Throughout the course of these proceedings, the government has acknowledged that petitioners Marks and Zitko have standing to object to the introduction of evidence seized from their personal offices at the Company's district headquarters at Georgetown, Ohio. Relying on *Mancusi* v. *DeForte*, 392 U.S. 364, however, petitioner Marks contends that he also has standing to challenge the legality of the searches at the five mine sites because, as an environmental officer for the Company, he

[11]Because these searches were in fact conducted pursuant to valid warrants, there is no reason to hold these cases pending disposition of *Marshall* v. *Barlows, Inc.,* No. 76-1143, argued January 9, 1978, which involves a challenge to the warrantless regulatory search of business property authorized by the Occupational Safety and Health Act of 1970, 84 Stat. 1590, as amended, 29 U.S.C. 651 *et seq.*

Similarly, the decision below does not conflict with *Midwest Growers Co-op. Corp.* v. *Kirkemo,* 533 F. 2d 455 (C.A. 9). The Federal Coal Mine Health and Safety Act, unlike the regulatory statute in *Midwest Growers,* expressly grants officers a "right of entry to, upon, or through" the regulated premises as well as the power to conduct "inspection[s]" and "investigation[s]" (30 U.S.C. 813(b)(1)), and the warrants here conformed to the standard of probable cause required in criminal investigations.

[12]Although petitioner Zitko does not raise the standing issue in this Court, his position is identical to that of petitioner Marks, and our argument is equally applicable to both petitioners.

was ultimately responsible for its respirable dust records and periodically visited the five field offices. This contention is incorrect.

In *Brown* v. *United States,* 411 U.S. 223, 229, the Court repeated the general rule that a defendant is not a "person aggrieved by an unlawful search or seizure" (Fed. R. Crim. P. 41(e)) unless he is able to show that he was on the premises at the time of the contested search or seizure, had a proprietary or possessory interest in the premises searched, or was charged with an offense that included, as an essential element, possession of the seized evidence at the time of the alleged Fourth Amendment violation. This rule was applied in *DeForte* in the context of the search of a private office shared by DeForte and other union officials and the seizure of union records. In concluding that DeForte could properly challenge the search, the Court observed that "[i]t has long been settled that one has standing to object to a search of his office [and] * * * that the situation was not fundamentally changed because DeForte shared an office with other union officers" (392 U.S. at 369). The Court specifically noted that DeForte was present when the search occurred (*id.* at 365), that he had "spent 'a considerable amount of time' in the office and that he had custody of the papers at the moment of their seizure" (*id.* at 368-369; footnote omitted). In these circumstances, the Court concluded that he had "a reasonable expectation of freedom from governmental intrusion" (*id.* at 368) in the area searched. See *United States* v. *Stull*, 521 F. 2d 687, 692 (C.A. 6), certiorari denied, 423 U.S. 1059.

Thus, the simple allegation of a "supervisory" responsibility over the general area searched does not give a corporate official standing to contest the seizure of corporate records, because *DeForte* requires "a demonstrated nexus between the area searched and the work

space of the defendant." *United States* v. *Britt,* 508 F. 2d 1052, 1056 (C.A. 5), certiorari denied, 423 U.S. 825. See also *Lagow* v. *United States,* 159 F. 2d 245, 246 (C.A. 2), certiorari denied, 331 U.S. 858. Here, there was no such nexus between petitioners Marks or Zitko and the five field offices. Neither petitioner was present at any of these sites when the searches occurred and neither of them maintained a personal office in those locations. They therefore have standing to seek suppression only of the evidence obtained at their own work areas in the Company's district office at Georgetown.[13]

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

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FEBRUARY 1978.

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[13]Petitioner Marks (Pet. No. 77-606, pp. 19-20) also misperceives the automatic standing rule announced in *Jones* v. *United States,* 362 U.S. 257, 263. Petitioner was not charged with any offense that contains, as an essential element, possession of the seized evidence at the time of the contested search and seizure. Contrary to his apparent belief, he cannot claim standing merely because the seized evidence might be introduced against him at trial.

DOJ-1978-02

IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

NO. 77-557

CONSOLIDATION COAL COMPANY, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

REPLY BRIEF ON BEHALF OF PETITIONER

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CONSOLIDATION COAL COMPANY, Petitioner
v.
UNITED STATES OF AMERICA, Respondent

REPLY BRIEF ON BEHALF OF PETITIONER

ARGUMENT

he Government has conceded that the decision of the United States Court of Appeals for the Sixth Circuit[1] in this case is in error as to the Government's right to an administrative search warrant and is in conflict with other appellate decisions. However, it takes the position that certiorari should nonetheless be denied by this Court for the following reasons: (1) the decision is interlocutory; (2) the search warrant affidavits in question satisfied the *Aguilar-Spinelli*[2] test; and (3) alternatively, a warrantless search was proper under the holdings in the *Biswell*[3] and *Colonnade*[4] cases.

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1. Hereinafter, reference to the Sixth Circuit shall be to the majority opinion of Circuit Judges Celebrezze and Cecil in this case.

2. *Aguilar v. Texas,* 378 U.S. 108 (1964); *Spinelli v. United States,* 393 U.S. 410 (1969).

3. *United States v. Biswell,* 406 U.S. 311 (1972).

4. *Colonnade Catering Corp. v. United States,* 397 U.S. 72 (1970).

It is respectfully submitted that the alternative positions taken by the Government are not supportable. Moreover, rather than negating the request for a writ of certiorari, they actually enforce the need for a review by this Court.

1. *Interlocutory Nature of Decision*: Petitioner respectfully disagrees with the contention that this case is not appropriate for review by this Court and that the reversal and remand by the Sixth Circuit places petitioners in the same position as if the district court had denied their motions to suppress.

To begin with, the appellate process in this case was initiated by the Government pursuant to the provisions of 18 U.S.C. § 3731, which gives the Government the right to appeal a decision of a district court suppressing evidence where that "evidence is a substantial proof of a fact material in the proceeding." This statutory provision is an express recognition of the desirability of appellate review where district courts have, as here, granted motions to suppress and would indicate that decisions of this nature are not to be treated as interlocutory for purposes of appellate review.[5] Having been initiated by the Government, the appellate process should and can continue to a final resolution by this Court. This is especially true where, as here, the Court of Appeals' decision is based, not on a factual issue peculiar to the individual case, but upon novel and significant constitutional issues involving searches and seizures.

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5. *Cogen v. United States*, 278 U.S. 221 (1929), cited by the Government on page 5 of its brief, is inapplicable to this situation since it predated enactment of 18 U.S.C. § 3731, and involved an appeal by the defendant from a denial by a district court of a suppression motion.

The Government suggests that the issues in this case would be mooted if all petitioners were acquitted on remand. Although such a result would be favorable to petitioners in this particular case, it would not resolve the conflicts in decisions discussed in the Petition filed herein and would leave standing as a controlling principle of law a holding by the Sixth Circuit which the Government itself concedes is incorrect.

The Government has alternatively suggested that this Court would have an opportunity to review the issues presented herein if petitioners are convicted and the convictions are affirmed on appeal. Even if that situation occurs, it still leaves standing for an indefinite time a concededly incorrect decision which also is in conflict with other appellate decisions.

It is clear that this Court has the authority to grant and has developed a policy of granting certiorari to review the judgment of a court of appeals reversing and remanding an action to the district court for further proceedings in situations where (1) the court of appeals' decision is in conflict with other appellate decisions; (2) the issue decided is of general and significant importance—in contrast to an issue which is a matter of private interest to the litigants only; and (3) the issue presented is fundamental to the further conduct of the case. *Larson v. Domestic & Foreign Commerce Corporation*, 337 U.S. 682 (1949); *Land v. Dollar*, 330 U.S. 731 (1947); *United States v. General Motors Corp.*, 323 U.S. 373 (1945); *Hanover Star Milling Co. v. Metcalf*, 240 U.S. 403 (1916); and *Forsyth v. Hammond*, 166 U.S. 506 (1897).

It is respectfully submitted that this case satisfies each of the foregoing criteria and that certiorari should be granted. *Brotherhood of Locomotive Firemen & Engineers v. Bangor & Aroostook Railroad Co.*, 389 U.S. 327 (1967) did not involve a suppression motion and did not establish any policy concerning interlocutory appeals. It stands only for the proposition that in the circumstances of that case, it was not yet ripe for review.

2. *The Aguilar-Spinelli Test.* In support of its argument that the *Aguilar-Spinelli* test was satisfied, the Government has represented (pp. 6-7) to this Court that the unnamed informant had "witnessed the commission of illegal activities . . ." and that all of his information was based upon "personal knowledge". Petitioner disagrees with this representation and further submits that it is precisely the lack of specificity as to how the unnamed informant obtained his information concerning the activities of employees at the Georgetown laboratory which is fatal in testing the sufficiency of the affidavits. It is obvious that the informant did not personally witness any illegal activities and that he had no "personal knowledge" of claimed criminal conduct at the Georgetown laboratory. By contrast, his own activities at Franklin No. 25 Mine were completely neutral.

Furthermore, the failure to indicate in the affidavits how the *unnamed* informant came by his information as to the illegal activities also serves to distinguish this case from the circuit court cases cited by the Government on page 6 of its brief. Each of those cases involved a *named* informant whose information was obtained through personal observation or knowledge because he

was either an eyewitness to or victim of a crime. Such is clearly not the case here.[6]

Nor is the present case analogous to *United States v. Harris,*[7] also cited by the Government on page 6 of its brief. *Harris* involved "personal and recent observations" of criminal activity by the informant, who had also made a declaration against his penal interest. *Harris* did not involve a situation, such as was present in *Spinelli* and in this case, where "the affidavit failed to explain how the informant came by his information." *Harris,* supra at 579.

3. *Warrantless Search.* In addition to rejecting the Sixth Circuit's holding that administrative search warrants were appropriate here, the Gomernment has also rejected the Sixth Circuit's holding that the intrusion by the deputy marshals here could not be justified as a warrantless search. (Government's brief, pp. 9-13.) It should be noted that the Sixth Circuit rejected "out of hand" the warrantless search contention, concluding that "only inspections of the *underground* portions or

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6. The Government is also incorrect in its assertion that the "two named technicians" stated "that it was a company practice to submit fictitious dust samples to federal inspectors in *all* the company's mines in the Central Ohio District." (Emphasis added.) (Respondent's brief, pp. 8-9.) The Holgate affidavit quotes the informant as stating that the two technicians told him "that similar practices were employed at *other* mines in the Central Division" (A. 55a) (emphasis added.) without specifying what practices or which mines were being referred to. There is clearly no indication that *all* the mines in the Central Division were involved. Several mines were not searched in the May 22 raid. There is no way of determining which mines were being described in the affidavit.

7. *United States v. Harris,* 403 U.S. 573 (1971).

'active workings' of coal mines may be performed without search warrants under Section 813(a) and (b)." Additionally, the Sixth Circuit pointed out that nothing in the Act authorizes the wholesale seizure of records which took place here. (A. 5a-6a).

In the Federal Coal Mine Health and Safety Act, as in the legislation controlling liquor dealers in *Colonnade* and in the Gun Control Act in *Biswell,* Congress selected a standard that did not expressly provide for *forcible* entry and seizure in the absence of a warrant. Instead the Government was given a civil remedy of obtaining an injunction whenever an operator refuses to permit inspection of the mine or to furnish requested documents and records.[8] Additionally, civil penalties may be imposed upon those operators refusing entry or access to records.[9] Compare *Colonnade* and *Biswell* where criminal penalties could be imposed for refusal of entry, but as here, forcible entry was not provided for.

Like the liquor dealer in *Colonnade* and the gun seller in *Biswell,* the mine operator may permit the entry and inspection or be subject to coercion and punishment by injunction and civil fines for refusal. The inspectors may not, however, force entry.[10] The Government's brief (page 11) fails to recognize that the *Colonnade* decision turned upon Congress' failure to provide federal inspectors with a right of *forcible* entry without

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8. 30 U.S.C. § 818.

9. 30 U.S.C. § 819(a).

10. The *Biswell* defendant, unlike the defendant in *Colonnade,* expressly consented to the entry rather than face criminal prosecution for refusal. By contrast, the forcible entry in *Colonnade,* made despite the defendant's refusal to consent, was struck down.

a warrant rather than, as the Government claims, that Congress had not provided for warrantless entries at all.

Here, the search was accompanied by unauthorized force, to wit, the use of an invalid warrant. No consent to this forcible entry was given since submission to an invalid warrant does not constitute consent. *Bumper v. North Carolina,* 391 U.S. 543 (1968).

Additionally, as the Sixth Circuit correctly pointed out, the Act does not provide any authority, express or otherwise, for warrantless searches of Consol's private mine offices wherein it had and expected, privacy, citing *Youghiogheny and Ohio Coal Company v. Morton,* 364 F. Supp. 45 (S.D. Ohio 1973). Moreover, the Sixth Circuit recognized that the Act provides no right of forcible seizure of any property belonging to the operator.

In any event, a search for criminal evidence is not the equivalent of an administrative inspection. As the United States Court of Appeals for the Ninth Circuit observed in *United States v. Thriftimart, Inc.,* 429 F.2d 1006, 1008 (9th Cir. 1970), cert. denied, 400 U.S. 926 (1970), "the Supreme Court has long recognized that [searches for evidence of a crime] are not the legal equivalent of administrative inspections . . .". Continuing, the Court commented:

> "Further, as stated in Camara, the administrative search is 'neither personal in nature nor aimed at the discovery of evidence of crime' and thus involves 'a relatively limited invasion of the urban citizen's privacy.' " Id. at 1009.

In its claimed right of warrantless search, the Government has chosen to ignore the forcible entry which took place here, the fact that the Act provides no right

of seizure of private documents and the fact that this search was pursuant to a criminal investigation rather than merely part of an administrative inspection.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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